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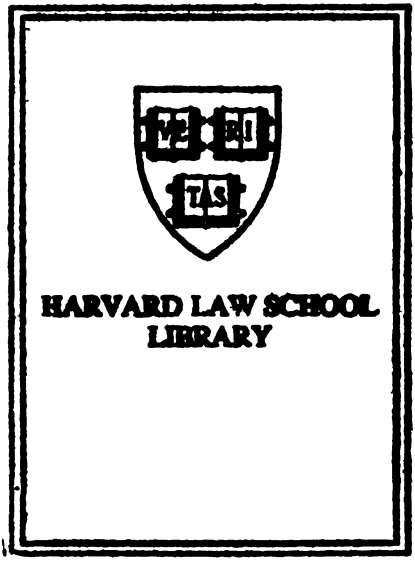
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OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS

OF KENTUCKY.

VOLUME I.

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TABLE OF CASES REPORTED.

Abbott et. al., Swearengen v. 271
Allen-Bradley Co. v. Anderson & Nelson Distilleries Co. 311
American Accident Co. v. Carson 441
Anderson & Nelson Distilleries Co., Allen-Bradley Co. v. 311
Anderson v. Richards' Exors. 661
Armour-Cudahy Packing Co., Nat. Oak Leather Co. v. 667
Arthur v. Commonwealth 85
Bannon, City of Louisville v. 74
Barker, Major v. 305
Beall, Russellville v. 515
Bedford, et al, v. Bedford's Adm'r 273
Bedford's Adm'r, Bedford et. al., v. 273
Belknap v. City of Louisville et. al. 474
Bement v. O. V. Banking & Trust Co. 109
Benedictine Order of Covington v. Town of Central Covington... 7
Board of Council et al. v. Murray 422
Board of Education v. Hawesville 292
Board of Aldermen, Gibbs v. 490
Brady v. Peck 42
Braswell et. al., Leonard et. al. v. 528
Breckinridge, L. & N. R. Co. v. 1
Brent v. Long et. al. 245
Briggs, Trustee, v. Russellville 515
Brooks-Waterfield Co. v. Frisbie et. al. 125
Brown &c. v. Henry &c. 13
Brown, Eastern Ky. R. Co. v. 540
Bullitt et. al v. Eastern Ky. Land Co. 324
Carson, American Accident Co. v. 441
Cavanaugh, Miller v. 377
Ches. & Ohio. R. Co. v. Commonwealth 175
City of Owensboro v. Simms 49
City of Owensboro v. Sparks 351
City of Louisville v. Bannon 74
City of Louisville v. Leatherman 213
City of Louisville et. al., Belknap v. 474
City of Louisville v. Wilson 598

Digitized by Google

City of Louisville v. Nevin 598
City of Louisville v. Hoertz 598
City of Louisville v. Martine 598
City of Louisville v. O'Connell 598
City of Hawesville v. Board of Education 292
City of Covington v. McKenna 508
Columbia Finance & Trust Co., Mason v. 117
Commonwealth v. Wickersham 21
Commonwealth, Arthur v. 35
Commonwealth, McTigue v. 66
Commonwealth v. Shelton 120
Commonwealth, L. & N. R. Co. v. 132
Commonwealth v. Drain et. al 162
Commonwealth, Lindsay v. 164
Commonwealth, Wilson v. 167
Commonwealth, C. & O. R. Co. v. 175
Commonwealth v. Heath 182
Commonwealth v. Hardin Co. Ct. 188
Commonwealth, Schwearman v. 296
Commonwealth, Warren v. 370
Commonwealth, use &c. v. Howard, &c. 542
Commonwealth, Patterson v. 610
Commonwealth, Henderson Bridge Co. v. 623
Commonwealth, L. & N. R. Co. v. 663
Courts v. L. & N. R. Co. 574
Crozier et. al. v. Cundall et. al. 202
Cundall et. al., Crozier et. al. v. 202
Davis, Pinckard, Rec'r v. 269
Denny, &c., Miller v. 53
Dickson v. Gleason 380
Douglass, Myers' Adm'r v. 267
Drain et. al, Commonwealth v. 162
Dumesnil et. al v. Gleason 652
Dunlap et. al., Todd, Mayor, v. 449
Eastern Ky. Land Co. Bullitt, et. al., v. 324
Eastern Ky. R. Co. v. Brown 540
East. Tenn. Tel. Co. v. Simm's Adm'r 404
Ezell &c., Ragsdale v. 236
Fehler v. Gosnell 380
Felton et al., Stephens et. al. v. 395
Finnell's Adm'r v. Lou. Sou. R. Co. 570
Fleming Co., Power v. 200
Frisbie et. al., Brooks-Waterfield Co. v. 125
Gaar, Scott & Co. v. Lyons &c. 672

Digitized by Google

Gaines, L. & N. R. Co. v. 411
Gibbs v. Board of Aldermen 490
Gleason, Dickson v. 380
Gleason, Dumesnil et. al., v. 652
Glenny Glass Co. v. Taylor &c. 24
Gosnell, Fehler v. 380
Green, Mt. Sterling Nat. Bank v. 262
Grogan, Hale v. 170
Hale v. Grogan 170
Hardin Co. Court, Highbaugh &c., v. 16
Hardin Co. Court, Commonwealth v. 188
Hartwell, L. & N. R. Co., v. 436
Harney, L. & N. R. Co. v. 157
Heath, Commonwealth v. 182
Henderson Bridge Co. v. Commonwealth 623
Henry &c. v. Brown &c. 13
Highbaugh &c. v. Hardin Co. Court &c. 16
Hill v. Rudd 178
Hilliard, Ill. Cen. R. Co. v. 684
Hines et. al, Wilson et. al v. 221
Hoertz, City of Louisville v. 598
Hoffman et. al., Traders' Deposit Bank v. 240
Howard &c., Commonwealth, use &c. v. 542
Huffman &c., Lafferty &c. v. 80
Ill. Cen. R. Co. v. Hilliard 684
Johnson, County Clerk et. al., Todd, Mayor, v. 548
Kinney v. L. & N. R. Co. 59
Lafferty &c. v. Huffman, &c. 80
Leatherman, City of Louisville v. 213
Leonard et. al. v. Braswell et. al 528
Lewis, New Albany Woolen Mills v. 398
Lindsay v. Commonwealth 164
Long et. al., Brent v. 245
Lou., Cin. & Lex. R. Co., Schmidt v. 143
Lou. Sou. R. Co., Finnell's Adm'r v. 570
Louisville Ths. Co. v. Monarch 578
Louisville Courier-Journal Co. et. al., Ratcliffe v. 416
Lou. & Nash. R. Co. v. Breckinridge 1
Lou. & Nash. R. Co., Kinney v. 59
Lou. & Nash. R. Co. v. Commonwealth 132
Lou. & Nash. R. Co. v. Harvey 157
Lou. & Nash. R. Co. v. Queen City Coal Co. 217
Lou. & Nash. R. Co. v. Webb 332

Digitized by Google

Lou. & Nash. R. Co. v. Gaines 411
Lou. & Nash. R. Co. v. Offutt 427
Lou. & Nash. R. Co. v. Hartwell 436
Lou. & Nash. R. Co., Courts v. 574
Lou. & Nash. R. Co. v. Commonwealth 663
Lyons &c., Gaar, Scott & Co. v. 672
Major v. Barker 305
Manion, by &c. v. O. V. R. Co. 504
Martine, City of Louisville v. 598
Mason v. Columbia Finance & Trust Co. 117
Mason county et. al., Pearce v. 357
Mass. Benefit Asso. v. Richart 302
Mass. Benefit Asso. v. Patrick 302
McAdams, Sterritt v. 37
McHenry v. Selvage, et. al. 252
McTigue v. Commonwealth 66
McKenna, City of Covington v. 508
Miller v. Denny, &c. 53
Miller v. Cavanaugh 377
Monarch, Louisville Ins. Co. v. 578
Morris, trustees Church Home v. 317
Morton v. Woodford, et al. 367
Mount Sterling Nat. Bank v. Green 262
Murray, Board of Councilmen et. al. v. 422
Myers, Adm'r v. Douglass 267
Nevin, City of Louisville v. 598
New Albany Woolen Mills v. Lewis 398
Newport News &c. Co. v. Stuart's Adm'r 496
Newport News &c. Co. v. Wyatt 496
O'Connell, City of Louisville v. 598
Offutt, L. & N. R. Co. v. 427
Ohio Valley Banking & Trust Co., Bement v. 109
Ohio Valley R. Co., Manion by &c. v. 504
Oil City Land & Imp. Co. v. Porter 254
Patterson v. Commonwealth 610
Patrick, Mass Ben. Asso. v. 302
Peck, Brady v. 42
Pearce v. Mason Co., et. al. 357
Pelper's Ex'x, Richie, Co. Judge v. 194
Pflanz, Schuff v. 97
Pflanz, Sheriff, &c., Stone, Auditor, v. 647

Digitized by Google

Pinckard, Rec'r v. Davis 269
Porter, Oil City Land & Imp. Co. v. 254
Power v. Fleming Co. 200
Queen City Coal Co., L. & N. R. Co. v. 217
Ragsdale v. Ezell &c. 236
Ratcliffe v. Lou. Courier-Journal Co. et. al. 416
Richart, Mass., Ben. Asso. v. 302
Richard's Exor's, Anderson v. 661
Richie, Co. Judge, v. Peiper's Ex'x 184
Rudd, Hill v. 178
Rudd, Shircliff v. 178
Schmidt v. Lou., Cin. & Lex. R. Co. 143
Schuff v. Pflanz 97
Schwearman v. Commonwealth 296
Selvage et. al., McHenry v. 232
Simms, City of Owensboro v. 49
Simms' Adm'r, East Tenn. Tel. Co. v. 404
Shelton, Commonwealth v. 120
Shircliff v. Rudd 178
Smith &c., Webb &c. v. 11
Sparks, City of Owensboro v. 351
Stephens et. al. v. Felton et. al. 395
Sterritt v. McAdams 37
Stone, Auditor, v. Pflanz, Sheriff &c. 647
Stuart's Adm'r, N. N. & M. V. Co. v. 496
Swearengen v. Abbott et. al. 271
Taylor &c., Glenny Glass Co. v. 24
Tilford et. al., Todd, Mayor v. 449
The Nat. Oak Leather Co. v. Armour-Cudahy Packing Co. 667
Todd, Mayor, v. Johnson Co. Clerk et. al. 548
Todd, Mayor v. Tilford et. al. 449
Todd, Mayor v. Dunlap, et. al. 449
Town of Central Covington, Benedictine Order of Covington v. .. 7
Town of Russellville v. Beall 515
Town of Russellville, Brigg's Trustee, v. 515
Trader's Dep. Bank v. Hoffman et. al. 240
Trustees Church Home v. Morris 317
Tyler v. Tyler &c. 31
Tyler &c., Tyler v. 31
Warren v. Commonwealth 370

Digitized by Google

Webb &c. v. Smith &c. 11
Webb, L. & N. R. Co. v. 332
Wickersham, Commonwealth v. 21
Wilson v. Commonwealth 167
Wilson et. al v. Hines et. al. 221
Wilson, City of Louisville v. 598
Woodford et. al, Morton v. 367
Wyatt, N. N. & M. V. Co. v. 496

Digitized by Google

TABLE OF CASES CITED, EXPLAINED, &C.,

IN THE CASES REPORTED IN THIS VOLUME.

Adams v. Ringo, 79 Ky., 211 314
Adams Express Co. v. Hoeing, 88 Ky., 373 432
Allen v. Russell, 78 Ky., 105 215
Alexander v. Gish, 88 Ky 542
Amer. Bell Tel. Co. v. Nat. Imp. Tel. Co., 27 Fed. Rep., 666 152
Attorney General v. Wallace, 7 B. M., 611 291
Auditor v. Holland, 14 Bush, 151 216
Bailey &c. v. McConnell &c., 12 Ky. L. R. 252
Bannon v. Rohmeiser, 90 Ky., 48 75
Bartley v. Fraine, 4 Bush, 475 103
Barbour v. Morris, Administrator, 6 B. M., 120 329
Bayless v. Prescott, 79 Ky., 252 208
Beard v. City of Hopkinsville, 95 Ky., 239 .....365 and 513
Beck v. Obst &c., 12 Bush, 268 653
Beloit v. Morgan, 7 Wall, 619 152
Bennett v. Wilmington &c. Co., 18 Ill. App., 17 154
Berry v. McCulloch, 94 Ky., 247 41,556
Bibb v. Prather, 1 Bibb, 316 328
Birney v. Richardson, 4 Dana, 424 208
Board of Trustees v. Gill, 94 Ky., 138 524
Boone v. Nevin, 15 Ky., L. R., 547 655
Bound v. Wis. Cen. R. R. Co., 45 Wis., 543 486
Broadus v. Broadus, 10 Bush, 299 615
Bransom's Adm'r v. Labrot &c., 81 Ky., 638 343
Britton v. Atlanta &c. Ry. Co., 88 N. C., 536 62
Bradley v. Skillman, 3 Ky. L. R., 734 209
Brown v. Jenks, 98 Cal., 10 393
Brown v. Vancleave, 86 Ky., 381 155
Burdette v. Commonwealth, 93 Ky., 77 373
California v. Pac. R. R. Co., 127 U. S., 40 644
Carr v. Coke, 116 N. C., 223 93
Carroll Co. v. Smith, 111 U. S., 565 481

Digitized by Google

Cecil v. Howard, 10 Bush, 97 243
City v. Commonwealth, 1 Duvall, 296 216
City v. Nevin, 10 Bush, 550 216
City of Owensboro v. Simms, 17 Ky. L. R., 1393 356
City of Louisville v. Henderson, 5 Bush, 520 390
City of Covington v. Dressman, 6 Bush, 214 390
Cheeney v. Hoover, 9 B. M., 330 ..... 9, 523
Chicago &c. R. Co. v. Dey, 35 Fed. Rep., 866 138
Chiles v. Smith, 13 B. M., 460 122
Cleveland v. Cleveland, 5 Ky., L. R., 56 208
Claflin v. Fletcher, 7 Fed. Rep., 851 151
Clarke v. Boorman, 18 Wall, 493 283
Cole v. Favorite, 69 Ill., 457 154
Coover's Appeal, 74 Pa. St., 143 322
Connors v. Commonwealth, 13 Bush, 718 376
Collins v. Henderson, 11 Bush, 88 216
Commonwealth v. Cain, 14 Bush, 533 93
Commonwealth v. Yarborough, 84 Ky., 496 108
Commonwealth v. Hawkins, 17 Ky. L. R., 744 165
Commonwealth v. Fowler, 17 Ky. L. R., 1209 166
Commonwealth v. Matthews, 3 Ky. L. R., 473 166
Commonwealth v. Duncan, 91 Ky., 592 185
Commonwealth v. Magowan, 1 Met., 363 187
Commonwealth v. Perigo, 3 Met., 55 187
Commonwealth v. Wilson, 7 Ky. L. R., 666 298
Commonwealth v. Barry, 33 S. W. Rep., 400 309
Commonwealth v. Hourigan, 89 Ky., 311 348
Commonwealth v. McGuire, 7 Ky. L. R., 814 615
Copeland v. St. Joseph, 29 S. W. Rep., 281 527
Craft v. Commonwealth, 80 Ky., 349 618
Craycroft v. Selvage, 10 Bush, 698 216
Crittenden v. Commonwealth, 82 Ky., 164 348
Cromie's Heirs v. Louisville Orphan Society, 3 Bush, 365 291
Culbertson v. Fulton, 127 Ill., 30 514
Cunningham v. Commonwealth, 9 Bush, 149 618
Curling v. Curling, 8 Dana, 38 291
Daniel v. Daniel, 6 Dana, 98 314
Dartmouth College v. Woodward, 4 Wheat, 518 294

Digitized by Google

Doores v. Varnon, 15 Ky. L. R., 244. Holloway v. Lou. &c. R. C., 92 Ky

Doores v. Varnon, 15 Ky. L. R., 244 ..... 13, 229
Dow v. Bridleman, 125 U. S., 680 141
Dumesnil &c. v. Shanks, 17 Ky. L. R., 170 654
Dye v. Knox, 1 Bibb, 575 546
Eagle Co. v. Bradley &c. Co., 50 Fed. Rep. ,193 151
East Line &c. R. Co. v. Scott, 13 Amer St. Rep., 758 435
Eddy's Ex'or v. Northup, 15 Ky. L. R., 434 314
Eifert v. Town of Central Covington, 91 Ky., 194 10
Ellison v. M. & O. R. Co., 36 Miss., 572 261
Erwin v. St. Louis &c. R. Co., 35 Amer. & Eng. R. Cases, 390 349
Erwin v. Commonwealth, 96 Ky., 422 187
Estill v. Peacock, 48 Mich., 471 153
Evans v. Brown, 30 Ind., 514 91
Everett v. Smith, 22 Minn., 53 483
Ex. Parte, Hannen, 3 Pet., 230 461
Fidelity Trust &c. Co. v. Morganfield, 96 Ky., 564 478
Fidelity & Casualty Co. v. Johnson, 30 L. R., A. 206 445
Field v. Clark, 143 U. S., 649 84
Flint v. Norwich Trans. Co., 54 Conn., 554 62
Garrard v. Garrard, 7 Bush, 436 114
Garrard Co. Court v. McKee, 11 Bush, 238 546
Garrott v. Ratliff, 7 Ky. L. R., 463 621
Ger. Mut. Ins. Co. v. Sherwood, 14 Howard, 352 593
German Bank v. Jefferson, 10 Bush, 326 402
Gillispie v. Palmer, 20 Wis., 544 486
Goddin v. Shipley, 7 B. M., 575 29
Gosnell &c. v. City of Louisville, 14 Ky. L. R., 719 391
Guedel v. The People, 43 Ill., 226 186
H. & T. C. R. Co. v. Smith, 63 Tex., 322 219
Haggin v. Williamson, 5 Mon., 13 174
Halgreen v. Campbell, 82 Mich., 255 461
Hanley v. Cunningham's Trustee, 12 Bush, 401 122
Hardee v. Wentworth, 42 Pac. Rep., 1028 93
Harris v. Harris, 85 Ky., 49 538
Hayes v. Mass. Mut. Ins. Co., 1 L. R. A., 304 506
Head v. Georgia R. Co., 11 Amer. St. Rep., 434 415
Heckman v. L. & N. R. Co., 85 Ky., 638 148
Herndon v. Louisville Banking Co., 10 Ky. L. R., 584 265
Hoboken v. Gear, 27 N. J. Law, 265 459
Hoffman v. Brungs, 83 Ky., 404 243
Hogg v. Baker, 17 Ky. L. R., 577 484
Holloway v. Louisville &c. R. Co., 92 Ky., 244 573

Digitized by Google

Hollingsworth v. Thompson, 12 Southern Rep., 4 93
Hood v. Dawson, 17 Ky. L. R., 880 209
Hubbard v. Grand Rapids &c. Ry. Co., 7 West, 850..... 415
Hughes v. Hughes, 12 B. M., 115 209
Hunt v. Wright, 70 Miss., 298 93
Hutchcraft's Ex'or v. Travelers' Ins. Co., 87 Ky., 300 445
Hyatt v. Bank of Ky., 8 Bush, 193 29
Hydes & Goose &c. v. Joyce, 4 Bush, 264 425
In re Ferguson's Estate, 20 Atl. Rep., 945 322
In re Green, 134 U. S., 379 554
Jackson v. Moore, 8 Dana, 170 538
Jenkins v. Prewitt, 7 Blackford, 329 261
Johnson &c. v. Stewart, 8 Ky. L. R., 857 15
Kansas v. Pfefferle, 30 Kan., 90..... 375
K. C. R. Co. v. Gastineau's Adm'r, 7 Ky. L. R., 3..... 343
Kentucky Hotel Co. v. Camp., 30 S. W. Rep., 1010..... 343
Kendrick v. Wheatley, 3 Dana, 34..... 329
King &c. v. Commonwealth, 86 Ky., 436..... 94
Kirkpatrick v. Commonwealth, 95 Ky., 326..... 191
Lackland's Heirs v. Downing's Ex'ors, 11 B. M., 32..... 212
Landes v. Hamilton, 77 Mo., 565..... 153
Lake Erie R. Co. v. Fixie, 11 Amer. & Eng. R. Cases, 109..... 415
Law v. The People, 87 Ill., 385 514
L. C. & L. R. Co. v. Goetz' Adm'r, 79 Ky., 449..... 503
Lea. v. Deakin, 11 Biss., 23, 13 Fed. Rep., 514 152
Leaman v. Enterprise, &c., v. Ins. Co., 21 Fed. Rep., 781 592
Lease v. Freeborn, 52 Kansas, 750..... 458
Leeds v. Shaw's Adm'r, 82 Ky., 79..... 291
Levi v. New Orleans Ins. Asso., 2 Wood, 66..... 593
Linton v. Harris, 78 Ga., 265..... 155
L. & N. R. Co. v. Davidson Co., 1 Sneed, 637..... 486
L. & N. R. Co. v. Harvey, 34, S. W. Rep., 1069..... 435
L. & N. R. Co. v. Hunt, 11 Ky. L. R., 825..... 243
L. & N. R. Co. v. Hall, 12 Bush, 131..... 148
L. & N. R. Co. v. Railroad Commission, 16 Amer. & Eng. R. Cases, 15..... 137
Long v. City of Louisville, 17 Ky. L. R., 253..... 365
Lovejoy v. Murray, 3 Wall, 1, 18, 19..... 153
Lovelace v. Travelers' Pro. Asso., 126 Mo., 104..... 445
Lowe v. Commonwealth, 3 Met., 237..... 103
Lowell v. Shannon, 60 Iowa, 713..... 119
Lyons v. Woods, 153 U. S., 649..... 93

Digitized by Google

Malone v. Conn, 95 Ky., 93 272
Maltus v. Shields, 2 Met., 553 524
Martin v. City of Louisville, 16 Ky. L. R., 786 79
Masonic Savings Bank v. Bang's Adm'r, 8 Ky. L. R., 16 265
McKean v. Read, 12 Amer. Dec., 13 171
McTigue v. Commonwealth, 17 Ky. L. R., 1418 365
McAllister v. Tacoma, 37 Pac. Rep., 447 394
McGlinchey v. Fidelity &c., Co., 80 Me., 251 447
McDeed v. McDeed, 67 Ill., 545 536
McPherson v. Blacker, 146 U. S., 35 554
Meadows v. Goff, 90 Ky., 54 155
Messenger v. Penn. R. Co., 31 N. J. L., 407 141
Metcalfe v. Seattle, 25 Pac. Rep., 1010 486
Miller v. Liggett, &c., Co., 7 Fed. Rep., 91 152
Miller v. Hall, 1 Bush, 237 329
Mindy v. Commissioners, 72 N. Y., 455 463
Mooar v. Covington Bank, 80 Ky., 305 ..... 122, 305
Moran v. Moran, 12 Bush, 303 131
Moran v. Dillehay, 8 Bush, 434 208
Moore's Heirs v. Moore's Devisees, 4 Dana, 354 291
Morse v. Knapp, 37 Fed. Rep., 352 152
Myers v. Block, 120 U. S. 542
New Orleans R. Co. v. Burke, 53 Miss., 200 62
Nineteenth, &c., Pres. Church v. Fithian, 16 Ky. L. R., 591 15
Nolan v. N. Y. & N. H. R. Co., 25 Amer. & Eng. R. Cases, 342 349
Norman, Auditor, v. Kentucky Board, &c., 93 Ky., 537 83
Ogden v. Redmon, 3 A. K. M., 234 386
Ohio v. Foraker, 47 O. St. 483
O'Mahoney v. Bullock, 17 Ky. L. R., 523 364
Orient Ins. Co. v. Adams, 123 U. S., 67 592
Oswald v. Morris, 92 Ky., 52 384
Paducah & M. R. Co. v., 12 Bush, 41 343
Palmer v. Hayes, 112 Ind., 292 155
Parrish v. Vaughn, 12 Bush, 97 208
Parrish v. Oldham, 3 J. J. M., 544 329
Parks v. R. Co., 23 Ind., 572 261
Payne v. Barnett, 2 Mar., 314 174
Peace v. Stewart, 4 J. J. M., 449 174
Pence Case, 93 Ky., 96 593
Peynado v. Peynado, 82 Ky., 5 291
Phelps v. Bates, 54 Conn., 11, 1 Amer St. Rep., 92 288

Digitized by Google

Phoenix Ins. Co. v. Erie Trans. Co., 117 U. S., 312 593
Pittsburg &c. R. Co. v. Hinds, 53 Pa. St., 512 62
Pittsburgh v. Pillow, 76 Pa. St., 510 62
Pittsburgh &c. R. Co. v. Heunch, 39 Ind., 509 415
Pollard v. Yoder, 2 A. K. M., 264 386
Pool v. Benning, 9 B. M., 623 208
Preston v. Roberts &c., 12 Bush, 587 658
Prince v. Quincy, 105 Ill., 138; 44 Amer. Rep., 785 514
Pursifull v. Pineville Bank, 17 Ky. L. R., 38 265
Purnell v. Culbertson, 12 Bush, 370 212
Putnam v. Broadway &c., 54 N. Y., 108; 14 Amer. Rep. 190 62
Railroad Commission Cases, 116 U. S., 336 138
Railroad Co. v. Jones, 149 Ill., 361 140
Railroad v. The People, 77 Ill., 443 141
Railroad Co. v. Prewitt's Adm'r, 92 Ky., 223 410
Railroad Co. v. Ellis' Adm'x, 30 S. W. Rep., 979 410
Ridgeway v. Moody's Adm'r, 91 Ky., 581 107
Riggs v. Commonwealth, 17 Ky. L. R., 1015 187
Robbins v. Chicago, 4 Wallace, 657 151
Robertson v. Shutt, 9 Bush, 659 683
Russell v. Allen, 107 U. S., 182 291
Sanders v. Norton, 4 Mon., 464 386
Savings Bank v. McAllister, 83 Ky., 151 242
Saxton v. North River Bridge Co., 153 U. S., 525 619
Schmidt v. L. & N. R. Co., 95 Ky., 289 145
Sharp's Ex'or v. Donovan, 17 B. M., 223 525
Shelly v. McCulloch, 17 Ky. L. R., 53 ..... 41, 552
Shields v. L. & N. R. Co., 29 S. W. Rep., 978 343
Sherley &c. v. Billings, 8 Bush, 147 61
Smelz &c. v. Giles &c., 12 Bush, 491 653
Smith v. Kelly's Heirs, 22 Miss., 167 536
Smith v. Moberly, 15 B. M., 72 384
Sneed v. Moore, 5 J. J. M., 159 537
Sosh v. Commonwealth, 4 Ky. L. R., 254 187
South v. Commissioners, 86 Ky., 186 457
South Bend v. Lewis, 37 N. E. Rep., 986 486
Southgate v. City of Covington, 15 B. M., 491 9
Speed &c. v. Crawford, 3 Met., 207 555
Speed v. Detroit, 97 Mich., 198 461
Speers v. Sewall, 4 Bush, 239 328
Spohn v. Railroad Co., 26 Amer. & Eng. R. Cases, 252 62
Springfield v. Edwards, 84 Ill., 626 514
State v. Town Council, 39 S. C., 307 84

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State v. Jones Co., 6 Wash, 468 90
State v. Moore, 37 Neb., 13 93
State v. Nye, 42 Pac. Rep., 856 93
State v. Boyce, 40 N. E. Rep., 113 93
State v. Brown, 57 Mo., 179 461
State v. Lancaster, 6 Neb., 474 484
State v. Winkelheimer, 35 Mo., 103 484
Stephenson v. State, 25 S. W. Rep., 784 187
Stoddard v. Thompson, 31 Iowa, 801 154
Strong v. Phoenix Ins. Co., 62 Mo., 289 155
Sturgis v. Work, 126 Ind., 134; 17 Amer. St. Rep., 349 288
Swift v. City of Newport, 7 Bush, 37 523
Thayer v. Burchard, 99 Mass., 508 219
Thackstun v. Watson, 84 Ky., 206 208
The Enterprise, 1 Paine, 34 139
The People v. Maher, 63 N. Y., 83 393
The People v. Stephenson, 15 Ill., 110 458
The People v. Stout, 19 Howard (N. Y.), 171 459
The People v. Whitlock, 92 N. Y., 191 459
The People v. Wyant, 48 Ill., 263 481
The People v. Warfield, 20 Ill., 160 481
The People v. Brown, 11 Ill., 478 483
The People v. Coleman, 34 Amer. & Eng. Cor. Cases, 223 635
Toney v. Harris, 85 Ky., 473 556
Tozer v. United States, 52 Fed. Rep., 917 139
Trimble v. Commonwealth, 78 Ky., 178 376
United States v. Sharp, Pet. C. C., 122 139
United States v. Fort Scott, 99 U. S., 152 514
Usher's Ex'or v. Floyd, 83 Ky., 563 328
Valentine v. Mahoney, 37 Cal., 389 154
Van Meter v. Van Meter's Assignee, 14 Ky. L. R., 214 118
Vance v. Louisville C.-J. Co., Ky. 41 421
Van Natta v. People's St. Ry., &c., Co., 34 S. W. Rep., 505 343
Vaughan v. Myers, 2 Dana, 113 329
Vertrees' Adm'r v. Railroad Co., 95 Ky., 314 31
Vliet v. Camp, 13 Wis., 198 29
Walker v. Railroad Co., 34 Miss., 255 261
Warfield v. Davis, 14 B. M., 41 155
Washle, &c., v. Nehan, 3 Ky. L. R., 387 653
Waters v. Merchants', &c., Ins. Co., 11 Peters, 213 592
Wayne Co. Bank v. Lord, 81 N. Y., 572 29

Digitized by Google

Webb v. Smith, 17 Ky. L. R., 1308. Zable v. Harris, 82 Ky., 475.

Webb v. Smith, 17 Ky. L. R., 1308..... 229
Western Union Tel. Co. v. Taggart, 40 N. E. Rep., 1051..... 93
Whitehead v. Woodruff, 11 Bush, 209..... 402
Wiggins Co. v. O. & M. R. Co., 142 U. S., 292..... 156
Wight v. Shelby R. Co., 16 B. M., 4..... 261
Wills v. Wills, 85 Ky., 492..... 209
Wilson v. Johnson, 95 Ky., 415..... 95
Wilson v. Deen, 121 U. S., 525..... 152
Winn v. Young, 1 J. J. M., 52 379
Winnegar's Adm'r v. Cen. Pass. Ry. Co., 85 Ky., 553..... 61
Williams v. Western Union Tel. Co., 93 N. Y., 162..... 637
Wood v. Commonwealth, 11 Bush, 220.....122, 386
Wood v. Ensel, 63 Mo., 193..... 155
Woods v. Patrick, Hardin, 457..... 386
Wright v. Wood's Adm'r, 96 Ky., 56..... 409
Young, v. Harris, 14 B. M., 447..... 29
Young v. Commonwealth, 14 Bush, 161..... 124
Zable v. Lou. Baptists' Orphan Home, 92 Ky., 91..... 235
Zable v. Harris, 82 Ky., 475..... 384

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DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY.

JANUARY TERM, 1896.

CASE 1—PETITION ORDINARY—MARCH 3.

Louisville & Nashville Railroad Co. v. Breckinridge.

APPEAL FROM BOYLE CIRCUIT COURT.

1. EJECTED PASSENGER—RIGHT TO RE-ENTER TRAIN.—Where a passenger has been rightfully ejected or in part expelled from a train for non-payment of fare, he is not then entitled to tender the fare and demand transportation. But where there is a dispute as to the station or point where the passenger should change cars for his point of destination, the train not having been stopped solely for the purpose of ejecting him, he may, after having yielded quietly and submissively to ejection, tender his fare and have the right to re-enter the train just as other passengers.
2. EXCESSIVE DAMAGES.—Where there was no personal injury to a passenger in being ejected from a train, and the delay caused by his ejection resulted in no pecuniary loss to him, a verdict for $500 damages is excessive.

R. P. JACOBS AND C. R. McDOWELL FOR APPELLANT.

1. The ticket of a passenger is the only evidence that the conductor is bound to or prudently can accept as to the rights of transportation of the passenger. (37 Mich., 342; 26 Amer. Rep., 531; Wood's Railway Law, 2 vol., sec. 350.)
2. If the passenger claims any rights to further transportation under claim of different contract than is indicated by the ticket, it is his duty, upon demand of the conductor, to pay the fare for the additional transportation, and rely upon his contract for the recovery thereof. (Wood's Railway Law, 3 vol., page 1439; 26 Amer. Rep., 531.)
3. And upon his failure or refusal to so pay the fare, it is the right and duty of the conductor to eject him; and also his right to pre-

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vent the obstinate passenger from re-entering the train, if it is about to start or has started. (52 Iowa, 342; 47 Iowa, 82; 29 Amer. Rep., 458; Wood's Railway Law, vol. 3, page 1434.)

4. There being no violence or insulting language offered to the appellee upon his ejection from the train, and no loss of time or loss of business, the verdict for $500 is clearly excessive, and the result of passion or prejudice.

R. J. BRECKINRIDGE, JR., FOR APPELLEE.

1. Where a verdict is not so excessive as to indicate prejudice on the part of the jury, it should not be disturbed.
2. As between the conductor and passenger the ticket produced must be conclusive evidence of the passenger's right to travel; but the application of this rule does not extend to a passenger who has been furnished with a ticket on its face sufficient, and declared so by the company's agent, but which is in fact not so according to its rules. (Hutchinson on Carriers, 2d ed; Mechem, sec. 5808.)
3. After appellee's expulsion from the train because of his refusal to pay fare, he claiming the right to transportation under a contract with the company's agent, he had a right to abandon his contract and reconsider his refusal to pay the fare, and to re-enter the train as any other passenger.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This action was instituted in the Boyle Circuit Court by the appellee, R. J. Breckinridge, Jr., against the appellant, seeking to recover damages for being ejected from appellant's train of cars, and for the refusal of appellant to permit him to ride on said train from Lebanon Junction to Louisville.

It is substantially alleged in the first paragraph of the petition that appellee purchased of appellant's agent, at New Orleans, La., a ticket from there to Junction City, Ky., and that, according to appellant's method of running and operating its road and trains, it was necessary for appellee to change cars and wait several hours at Louisville, Ky., where appellant's trains from New Orleans were advertised to and

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did make connection with appellant's trains for Junction City; and that, when he bought said ticket, he was so informed by appellant's agent at New Orleans, and the same was agreed to by the agent and appellee, and made one of the conditions and part consideration of the said sale and purchase of the ticket; that he at once entered on train No. 2 and complied with all the conditions of said ticket contract; but that when said train reached Lebanon Junction, about 1:20 a. m., December 1, 1893, appellant's conductor informed appellee that he must leave said train, and that he refused to do so, but said conductor and agent wrongfully, maliciously and forcibly, without fault of appellee, ejected him therefrom while said ticket was in full force and effect, and that he was compelled to wait many hours, in the night time, greatly to his inconvenience and injury, and was thereby caused great pain and suffering, both mentally and physically, humiliated before the public, detained from and injured in his business to his damage of $15,000, for which he prayed judgment.

In the second paragraph of the petition it is alleged in substance that, after the appellee was ejected from said train, he boarded same and tendered to said conductor the fare to Louisville, to which point he wished to go, but the conductor wrongfully and maliciously failed and refused to accept said fare, and wrongfully refused to carry plaintiff in said train to Louisville, and wrongfully, maliciously and forcibly pushed plaintiff from the steps of said train while it was in motion, greatly to plaintiff's personal danger, and thereby caused appellee great personal danger, pain and suffering, both mental and physical, humiliated him before the public, detained him from and injured him in his business, and damaged him in the sum of $15,000, etc. It is also

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alleged that said Lebanon Junction and Louisville are advertised as and are regular stopping places on appellant's said road for said train No. 2.

Appellant, in its answer, denied that it was necessary for appellee to change cars at Louisville, in going from New Orleans to Junction City, and alleged that he was informed and well knew the fact when he purchased his said ticket; denied that appellee was informed, when he purchased the ticket, that he was to or could go to Louisville to change cars for Junction City.

It is also alleged in the answer, in substance, that the regular and proper route from New Orleans to Junction City is by way of Lebanon Junction, and that at that point passengers for Junction City should change cars. It is admitted that the conductor compelled appellee to leave the train at Lebanon Junction, but denied all wrong and injury to appellee. It is also averred in the answer that the conductor, before ejecting appellee, offered to take him on to Louisville if he would pay the fare, which he refused to do, and admits that, as the train was starting and moving from the station, appellee attempted to board the train, offering to pay the fare to Louisville, which was refused, and appellee not permitted to again take passage on the train.

The reply traversed the material averments of the answer.

At the conclusion of appellee's testimony appellant moved the court to instruct the jury peremptorily to find for the defendant, which motion was properly overruled by the court, and a trial resulted in a verdict and judgment in favor of plaintiff for $500; and defendant's motion for a new trial having been overruled, it prosecutes this appeal.

Several grounds for a new trial are relied on. It seems

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to us that the admission of the testimony of Whitehouse and others, complained of, restricted as it was by the court, was not prejudicial to appellant's substantial rights. The motion for peremptory instructions was properly overruled.

The three instructions asked by appellant are as follows:

"A 1. If the jury believe from the evidence that appellant did not make, through its agent, a contract with plaintiff that he might travel on the ticket exhibited in evidence from Lebanon Junction to the city of Louisville, they must find for the defendant.

"A 2. The court instructs the jury that, although they may believe from the evidence that defendant's agent agreed with plaintiff that he could travel on the ticket exhibited in evidence from Lebanon Junction to the city of Louisville, yet, if the conductor of defendant's train, on which plaintiff was, notified him, before the arrival of the train at Lebanon Junction, or on its arrival there, that he could not continue on the train unless he paid the usual fare for passage between said Lebanon Junction and the city of Louisville, and then plaintiff had with him the money with which to pay the fare, it was the duty of plaintiff to then pay the fare, and they must find for the defendant.

"A 3. If the jury believe the facts to be as indicated in either of the foregoing instructions, defendant's conductor had a right to refuse fare tendered by plaintiff at Lebanon Junction after he had been put off the train and to refuse him passage on said train."

The court below properly refused the foregoing instructions. All the instructions asked by plaintiff were refused, and the court, on its own motion, gave instructions, to all of which appellant excepted.

The court instructed the jury in substance that the expul-

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sion of the appellee from the train at Lebanon Junction, complained of in the first paragraph, was lawful, but if they believed from the evidence that plaintiff, at the time of the purchase of the ticket, contracted and agreed with defendant's agent that he should have the right to go by the way of Louisville to Junction City, they should find for plaintiff the car fare from Lebanon Junction to Louisville and return.

It does not appear in evidence that any physical injury or indignity was suffered by the plaintiff in the manner of his expulsion, nor does it appear that his ticket provided that he should go by way of Louisville, hence the foregoing instruction was proper.

The court further instructed the jury in substance that the plaintiff had no right to re-enter the car at the junction, and that the appellant's conductor had a right to prevent him from so doing, but had no right to push him from the steps of the car while it was in motion, if plaintiff was thereby put in danger of personal injury.

The first part of the foregoing instruction is erroneous. It is true that some courts of last resort have held that, where a person has been rightfully ejected or in part expelled from a train for non-payment of fare, he is not then entitled to tender the fare and demand transportation, but the cases cited by counsel are unlike the case at bar. Here there was a dispute as to the station or point where plaintiff should change cars for the point of destination.

Lebanon Junction is admitted to be a point where the train stopped, and it did not stop there for the purpose of ejecting the plaintiff, and after he had quietly and submissively yielded to expulsion he was entitled to the same rights and privileges that any other citizen or passenger

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had who wanted to go to Louisville, as he manifestly did, for he took the next train for that point. The other instructions are erroneous in so far as they are inconsistent with the views above expressed.

It does not appear that any physical personal injury resulted to the plaintiff, nor that he suffered any pecuniary damage to his business by the delay in reaching Louisville, caused by the acts or omission to act on the part of appellant, hence we are of the opinion that the verdict is larger than the evidence justified. Appellee was clearly entitled to a verdict for some amount, but the evidence, in our opinion, was not sufficient to authorize a verdict for $500.

The judgment of the court below is, therefore, reversed and cause remanded for a new trial upon principles consistent with this opinion.

CASE 2.—PETITION EQUITY—MARCH 4.

Benedictine Order of Covington v. Town of Central Covington.

APPEAL FROM KENTON CIRCUIT COURT.

1. MUNICIPAL TAXATION OF FARMING LANDS.—Ordinarily farming lands which are added to a town by extension of its boundaries, for the purpose of increasing the taxable property and adding to the coffers of the town treasury, can not be made subject to such local taxation. But where the owner of such property was active in having the town laid off and incorporated so as to include his said farming lands, and his property was enhanced in value thereby, it is subject to municipal taxation.

WM. A. BYRNE FOR APPELLANT.

1. Where a property owner has voted for a town charter making his

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farming lands a part of the town, this act alone will not make his said property subject to municipal taxation. (Elfert v. Town of Central Covington, 15 S. W. Rep., page 180.) And that being true, the mere signing of a vague and uncertain petition, by one in charge of the land, would not be such an act as would make it subject to such taxation.

2. In a suit to recover taxes paid through mistake, the ten year statute of limitation applies. (Gen. Stats., sec. 6, art. 3, chap. 71; City of Louisville v. Anderson, 79 Ky., 335.)

ORLANDO P. SCHMIDT FOR APPELLEE.

1. The appellant stands in the attitude of one of the originators of the town, having had its lands included within the boundaries of the town, and petitioned the Legislature to so incorporate it. In such a case the lands are subject to local taxation. (Elfert v. Town of Central Covington, 91 Ky., 195.)
2. Where the constitutional validity of an act incorporating a town is established, all the property embraced within its limits must contribute equally to its revenues, no matter for what purpose the lands may be used. (Maltus v. Shields, 2 Met., 554.)

CHIEF-JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The Benedictine Brothers at Monte Casino are resisting the collection of taxes due the town of Central Covington for some four or five years, and are also seeking to recover back the taxes paid prior to the year 1889, on the ground that the payment was made under protest or in entire ignorance of their legal rights.

These brothers own a tract of land containing about seventy-six acres, a part of which land (11 acres), including the monastery building, wine cellars, etc., are included within the corporate limits of the town. This land, it is claimed, is used principally for farming purposes, and derives but little benefit from the corporation.

The town is a small place, has no fire protection or waterworks and no police force except, perhaps, a town marshal.

Central Covington is a town of the sixth class, and neither

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its population nor wealth would justify a taxation for such conveniences as are incidental to cities of the first and second class. Still this injunction should have been granted if the territory belonging to the brothers had been added to the town merely for the purpose of increasing the taxation and adding to the coffers of the town treasury, for it is essentially farming land and could not, ordinarily, be embraced within town limits and made subject to its local taxes. It appears, however, that this order, through its chief officer at this monastery, was active in having this town laid off and incorporated, and signed two or more petitions to the legislature defining the boundary of the town and asking that it be incorporated; and after the passage of the act, listed the property of the order for taxation for a number of years, from the year 1881 to the year 1888, and paid the taxes. The taxes are not exorbitant or oppressive, and the improvement of the little town has, no doubt, added to the value of appellant's property, and it is now too late, after the lapse of years, and when those in charge of the lands were active in having the act of incorporation passed, to complain of the taxation, and, by refusing to pay the taxes, leave to those who united in obtaining the charter the duty of bearing the entire burden. This is not an extension of boundary by legislative enactment, as in the case of Southgate v. City of Covington, 15 B. M., 491, so as the property might be subjected to municipal taxation without the corresponding benefits. The case of Cheaney v. Hoover, 9 B. M., 330, was a case where the town, without the consent of the owner of the land, imposed the taxation without the benefit following the burden. And, in all this class of cases, this court has held the act or acts adding to a pre-existing mu-

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nicipality farming land for the purposes of revenue were unconstitutional.

In this case the lands within a certain boundary, embracing the land of the appellant, constitute the original town, and its land brought into the town limits by the consent and aid of the appellant in procuring the charter. Other land was included within the boundary, belonging to different parties, and was, at the time, pasture land. This land has been laid off into town lots and many of them sold; and the appellant, deeming it unwise, or not desiring to convert its land into town lots, should not be allowed to resist the payment of taxes, as it stands upon perfect equality with all other incorporators or owners of land within the boundary as to such rights and privileges.

The case of Eifert v. The Town of Central Covington, 91 Ky., 194, is analogous to this case. There the owner voted for and assisted in placing his lands within the town limits, and it was held he was liable for the tax.

Here the right to tax attached the moment the town was incorporated, and the owner of the land can not, by refusing to lay off the territory into town lots escape taxation on the plea that it is farming land.

The testimony is plain that this corporation, or its property located at Monte Casino, was controlled by a superior or business manager during the whole period these taxes were paid. He represented the order, and his acts bind it with reference to the matter in controversy.

Judgment affirmed.

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CASE 3—PETITION EQUITY—MARCH 5.

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Webb, &c., v. Smith, &c.

APPEAL FROM FULTON CIRCUIT COURT.

1. The petition provided for by sec. 4464 of the Kentucky Statutes to be directed to the county judge preliminary to the calling of an election taking the sense of the voters of a proposed graded school district upon the proposition whether or not they will vote an annual tax for school purposes, should be filed with the county judge in term time, and the election therein provided for should not be ordered till the next regular term of the county court.

ED. THOMAS FOR APPELLANTS.

1. Section 4464 of Kentucky Statutes only requires that the county judge shall at the next term after he receives the petition make the order directing the sheriff to hold the election, etc.; and does not require that the petition shall be filed during a term of court, or that it shall lie over from one term to another. (Kentucky Statutes, sec. 4464.)
2. Section 4466, Kentucky Statutes does not require that the order of the county judge shall be advertised by written or printed bills to be posted, etc., but requires the election to be advertised in that way. (Kentucky Statutes, sec. 4466.)

ROBERTSON & FLOURNOY AND J. C. FLOURNOY FOR APPELLEE.

1. Section 4464, Kentucky Statutes, plainly contemplates that the petition asking that the election be called, should be presented to the county judge in open court at a regular term, and filed of record. And it was manifestly the intention of the Legislature that all such proceedings should be had in open court.
2. The petition did not lie over from one term to another before the order for the election was made, and the order is therefore void. (Doores v. Varnon, 15 Ky. Law Rep., 244.)

CHIEF-JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellees obtained an injunction preventing the collection of a tax levied for the purpose of changing the com-

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mon school district, No. 1, in Fulton county, to a graded school district. The proceeding was had under section 4464 of the Kentucky Statutes. The objection made and sustained below was a failure to comply with the section authorizing the change.

On the 6th day of July, 1894, a petition was lodged in the clerk's office, signed by ten taxpayers, asking that an election be held in the district for the imposition of the tax in order to have this graded school. On the 9th of the same month, it being county court, an order was made by the county judge calling the election to be held on the 20th of August.

It was insisted below, and we think properly, that the petition should have been presented to the county judge in term time and made a part of the record of the court. The statute provides that he shall not make the order calling the election until the next regular term after he receives the petition showing the necessity of having an entry of some description showing when the petition was received by him. The county court is a court of record, and the records must show that proper steps have been taken to comply with the law, and not leave the question as to when the petition was filed or received in the bosom of the judge alone, or allow the parties in interest to hand him the petition on the street or the highway without any evidence whatever of record to show that any such petition was ever filed except that made at the time the election is ordered. The petition must be filed at the one term and the order made at a subsequent term. The conversion of a common school district into a graded school district subjects the parties within the boundary to a tax for that purpose, and those interested should have some notice of the change contemplated, as was held

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in Doores v. Varnon, 15 Ky. Law Rep., 244, so as they may have opportunity to resist the application by showing, if they can, that the parties applying are not taxpayers or making suggestions as to the location of the boundary line. The filing of the petition at one term is the notice required, and, when filed, at the next term the order can be made.

Judgment affirmed.

CASE 4—PETITION ORDINARY TRANSFERRED TO EQUITY—MARCH 5.

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Henry, &c., v. Brown, &c.

APPEAL FROM LARUE CIRCUIT COURT.

1. IMPROVEMENTS BY LIFE-TENANT.—A life-tenant can not lay out money in building on the land and charge it on the estate in remainder, or make it a personal charge against the remaindermen. Nor does it seem to make any difference that he made the improvements upon the false assumption that he had absolute title to the property.

J. P. HOBSON FOR APPELLANTS.

1. A life-tenant who improves the property, knowing he has only a life estate therein, takes the risks; but where the life-tenant acted under a mistake as to his title, and on the advice of counsel, the rule should be different.
2. The rule is well settled in this State that a *bona fide* occupant of land, who improves it believing it to be his own, shall be compensated for the enhancement in value of the land by his expenditures. (Barlow v. Bell, 1 A. K. Mar., 246; Bell v. Barnett, 2 J. J. M., 520; Taylor v. Whiting, 9 Dana, 401; Barton v. Little, 9 Bush, 312.)
3. If a man, supposing he has an absolute title to an estate, should build upon the land with the knowledge of the real owner who should stand by and suffer the erections to proceed, without giv-

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ing any notice of his own claim, he should not be permitted to avail himself of such improvements, without paying full compensation therefor. (Story's Equity, secs. 388 and 1237.)

GORE & FRIEND ON SAME SIDE.

No brief in the record.

D. H. SMITH FOR APPELLEES.

1. The tenant for life has no claim for any improvements which he may have made upon the premises. He is bound to keep the premises in repair, but is under no legal obligation to undertake any improvements, and if he does so, it is a voluntary act of his own, which gives rise to no claim against the reversion for payment of his share of the expenses. (Tiedeman on Real Property, secs. 68 and 400; Wood's Mayne on Damages, p. 556; Sedgwick & Wait, pp. 479 and 481.)
2. A life-tenant can not lay out money in building on the land, and charge it on the estate in remainder or make it a personal charge, on the remainderman; and the fact that the tenant may have supposed that he had the absolute title to the property, does not prevent the application of this rule. (Johnson v. Stewart, 8 Ky. Law Rep., 857; 80 Ky., 432; 12 Ky. Law Rep., 551; 13 Ky. Law Rep., 65-6; Caldwell v. Jacob, 16 Ky. Law Rep., 22; Church v. Fithian, 16 Ky. Law Rep., 581.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Mary M. Henry died in 1879 intestate leaving her husband Thos. Henry and Mary T. Henry, their only child, who, however, died in 1880, being then less than two years old. Thos. Henry having again married, died in 1893, leaving Abie, his widow, and three children by her, Luther, Amelia and Stella Henry.

Appellees, Lidia E. Brown and others, mother, brothers and sisters of Mary M. Henry, brought this action, after the death of Thos. Henry, against Abie Henry, his widow, and three children mentioned, to recover a tract of land containing about seventy-two acres, of which said Mary M. Henry died owner.

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The right of appellees to recover the land does not seem to be contested, but appellants complain of so much of the judgment as dismiss their counterclaim for value of improvements put on the land by Thos. Henry while he occupied and used it as tenant by curtesy.

It has been often and distinctly held by this court that a tenant for life can not lay out money in building on the land and charge it on the estate in remainder or make it a personal charge against the remaindermen. Nor does it seem to make any difference that he made the improvements upon the false assumption that he had absolute title to the property. (See Johnson, &c., v. Stewart, 8 Ky. Law Rep., 857, and other cases there cited; also Nineteenth and I. S. Pres. Church v. Fithian, 16 Ky. Law Rep., 591.)

The circumstances of this case do not make it a proper exception to that general rule, but rather serve to illustrate the wisdom of it. The improvements are, in character and value, not suited or in proper proportion to the condition and intrinsic value of the land, but payment for them would require a sale of the whole unless the owners, some of whom are married women and others infants, should raise the money for that purpose from other sources.

The ground upon which the appellants base their claim is that Thos. Henry, the life tenant, in good faith believed, and made the improvement in the belief, he was absolute owner of the land.

The court can not give credit to such alleged belief unless there appears to have been a reasonable ground for it. In this case there was no foundation whatever for that belief because the statute provides plainly that, if an infant dies without issue, having title to real estate, derived by gift, devise or descent from one of his parents, the whole

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shall descend to that parent and his or her kindred, and no attorney would, if consulted, have advised him that he had any other than estate for life in the land.

Judgment affirmed.

CASE 5—PETITION ORDINARY—MARCH 6.

Highbaugh, &c., v. Hardin County, &c.

APPEAL FROM HARDIN CIRCUIT COURT.

1. DISCRETION OF FISCAL COURT IN ROAD IMPROVEMENTS—DISPOSITION OF SURPLUS FUNDS.—Under article 6, chapter 52, of Kentucky Statutes, which provides for the appropriation by the fiscal court of a county of surplus funds for the construction of turnpikes upon application by citizens of a magisterial district, upon certain conditions, which have been complied with by the said citizens, the fiscal court has no arbitrary power in the premises; but it has a discretionary power in making such appropriations, and has the power to see that the fund is properly distributed and properly applied.
2. In this case the fiscal court properly refused to make the order for the construction of the turnpike, because it is manifest that it would, when finished, only benefit a few of the residents of the district, and a large majority of the voters and taxpayers in the district desired its proportion of the surplus fund appropriated to the improvement of such roads therein as would benefit the greatest number.
3. MANDAMUS.—The fiscal court of a county is in effect a legislative board, invested with the power by law of making appropriations in cases where the needs of the county require it, and it is beyond the power of a judicial tribunal to interfere and determine what improvements should be made, and the extent of the expenditures necessary, even though that board may neglect its duties, fail to improve the roads or make appropriations for that purpose.

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HOBSON & O'MEARA FOR APPELLANTS.

1. The duty required of the fiscal court being mandatory, mandamus lies against it to compel compliance with the statute. In any view of the statute, the appellants were at least entitled to a hearing before the fiscal court. (Hoke v. Commonwealth, 79 Ky., 567; Commonwealth v. Boone County Court, 82 Ky., 632; Baldwin v. Shine, 84 Ky., 502; Cassidy v. Young, 92 Ky., 228; Kelley v. Toney, 15 Ky. Law Rep., 718.)
2. The phraseology of the statute shows plainly that no discretion was intended to be left to the fiscal court in making the appropriation for the construction of a turnpike, upon the compliance with the conditions thereof by the citizens of the district.

J. H. VANMETER FOR APPELLEES.

1. The action of a fiscal court in the appropriation of money for road purposes is a legislative and not a judicial act, and a mandamus will not lie to compel it to make a specific appropriation.
2. All the surplus funds in the county treasury had been appropriated by the fiscal court to the improvement of the county roads, and provisions made to have the work carried out, before appellants presented their petition, and asked the court to make an appropriation for the construction of the turnpike.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This is no case for a mandamus.

The appellants, some twenty or thirty in number, made application to the Hardin Fiscal Court for aid in the construction of a turnpike in Magisterial District No. 2 under the provisions of article 6 of chapter 52, Kentucky Statutes.

Section 1886 of that article gives plenary power to the fiscal court of any county in the State to appropriate any surplus money in its treasury to improving county roads, such as grading, graveling, building turnpikes, etc.

Section 1887 provides that "should any magisterial district or districts desire to unite in building a turnpike *it*

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shall be mandatory on the part of the fiscal court to build the same, provided the citizens of the district shall have subscribed one-tenth of the cost of same, as estimated by the engineer," etc.

Section 1888 requires the money to be expended by the court in such a manner as that each district shall receive its *pro rata* as the assessed value of the property in the district bears to the entire county.

Section 1889 empowers that court to appoint three commissioners in each magisterial district, who shall let out the work in their districts to the lowest and best bidder, with the privilege of refusing all bids.

It seems the contemplated building of the turnpike was in good faith, and the applicants, citizens and taxpayers of the district in which the improvement was to be made.

The county of Hardin had a large surplus of money, and this general law seems to have been passed so as to enable that county to dispose of this surplus in the appropriation of the money to the improvement of its roads, but of course applies to all the counties in the State. The fiscal court refused to hear the motion or entertain the application for an appropriation of any part of this surplus fund on two grounds:

1st. Because the contemplated turnpike when completed, would benefit but few of the citizens of the district, and that a large majority of the voters and taxpayers desired its appropriation to the improvement of such roads within the district as would advance the interest of the greatest number.

2d. The court had already made appropriations and distributed the surplus funds then on hand by an order of its court in such a manner as produced that equality required by section 1888 of the act.

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Prior to their application the court, by an order, appropriated $108,000 to the improvement of the county roads, by appointing commissioners, and directing them to expend, as they might deem to the best interest of each district, its proportion of this surplus fund, and that Magisterial District No. 2 was assigned $18,586.80, that being its *pro rata* part of the surplus.

It seems that there are near five hundred voters in this district, with near 3,000 inhabitants, and that about thirty of the taxpayers are insisting upon having a turnpike built at the place and in the manner they desire, while, on the other hand, it is alleged that such action would be to the great detriment of the remaining population and while section 1887 provides that where magisterial district or districts desire to unite in building a turnpike, it shall be mandatory on the part of the court to build the same, provided the citizens of the district shall pay one-tenth of the cost, it by no means follows that all discretion is taken from the fiscal court, and that whenever a surplus exists a part of the taxpayers can demand the *pro rata* of the district as a matter of right on their assuming to pay one-tenth of the cost of the original construction of the pike, without regard to its location or the benefits to be derived by those living within the district from its construction.

The entire act shows a discretionary power in the fiscal court when coming to dispose of this surplus fund, and while this power is not arbitrary, if those who first apply are entitled, then one part of the district might and could appropriate all of its *pro rata* of the surplus in improving the roads in which they were or are directly interested.

Under this general law the fiscal court has no power to say we will withhold the money, and make no disposition of the surplus for the improvement of roads, still it has the

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power to see that the fund is properly distributed, and that going to each district applied in such a manner as will benefit the greater part of its population. The commissioners required to be appointed under the act may even reject all bids and refuse to build if, in their opinion, the cost is exorbitant, showing a plain purpose to leave with the fiscal court and its commissioners some supervising power over these expenditures.

In this case if a mandamus was the proper remedy, the appellants have not shown a failure on the part of the court to discharge its duties, but, on the contrary, the court has made the appropriation and the commissioners have charge of the fund, but in our view of this question the writ should not go for another reason. The fiscal court of every county is in effect a legislative board, invested with the power by law of making appropriations in cases where the needs of the county require it, and while they may neglect their duties or omit to improve its roads, or to make other appropriations necessary for that purpose, it is beyond the power of a judicial tribunal to interfere and determine what improvements should be made, and the extent of the expenditure necessary for that purpose; but giving to the statute in question the meaning attached to it by counsel for appellants, yet it is manifest there is a discretion as to the mode of expending this surplus, and the court is not compelled to appropriate in every instance where an application is made and the offer or ability to pay the ten per cent. on the part of the citizens unquestioned.

Judgment affirmed.

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CASE 6—INDICTMENT—MARCH 7.

Commonwealth v. Wickersham.

APPEAL FROM PULASKI CIRCUIT COURT.

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1. GAMING—JURISDICTION.—Circuit courts have jurisdiction to try an indictment under the statute against unlawfully engaging in a game of chance, even though the offense may have been committed within a city the ordinances of which provide the same punishment therefor as is fixed in the statute.
2. The "exclusive jurisdiction" conferred upon police courts in cities of the fourth class by section 3513 of the Kentucky Statutes embraces only such offenses as have their origin and existence in virtue of ordinances applicable to the municipality, and independent of any statute of the State.

C. W. LESTER AND WM. J. HENDRICK FOR APPELLANT.

1. It seems clear that the legislature intended by section 3513 of the Kentucky Statutes to give to police courts in cities of the fourth class exclusive jurisdiction over only such offenses as are created by and arise out of ordinances of the city, or as would not be punishable, but for such ordinances.
2. By section 1093 of Kentucky Statutes the jurisdiction of justices of the peace is concurrent with that of the circuit courts in certain cases, embracing this case; and under the Constitution police judges can have no greater or less jurisdiction than justices of the peace; and it follows that police courts also have concurrent jurisdiction with the circuit court.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellee Wickersham was indicted in the Pulaski Circuit Court for the offense of unlawfully engaging in a game of chance in which money was bet, won and lost, made by section 1977, Kentucky Statutes, a misdemeanor, punishable by fine of not less than twenty dollars nor more than one hundred dollars; but the transcript contains the following recital: "This day this prosecution came on for trial, and by agreement of the parties a jury was waived and law and

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facts submitted to the court; and the court having heard the evidence, and being sufficiently advised, is of the opinion that this court has no jurisdiction to try the defendant for the offense charged; but that the police court of the city of Somerset, a city of the fourth class, has the exclusive jurisdiction over the offense charged under an ordinance passed by the city council of said city, in force at the time the offense in this case is charged to have been committed. It is, therefore, adjudged by the court that this prosecution be and the same is dismissed, and the defendant discharged."

It appears the city council of Somerset did, as recited in the judgment, pass an ordinance defining the offense substantially as it is described in section 1977, and fixing the same punishment as there prescribed; and it was shown the offense was committed within the corporate limits of the city of Somerset.

Section 966, Kentucky Statutes, gives to the circuit court original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal; and, therefore, no other part of the statutes, intended to be a complete and consistent system, should be construed to divest it of jurisdiction of any such matter unless it is in express terms or clearly so provided.

Section 143 of the Constitution provides that "a police court may be established in each city and town of the State, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within corporate limits of the city or town in which it is established, and such *criminal jurisdiction within the said limits as justices of the peace have.*"

Section 1093, Kentucky Statutes, provides that "justices shall have jurisdiction exclusive of circuit courts, in all penal cases, the punishment of which is limited to a fine not

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exceeding twenty dollars, and jurisdiction concurrent with circuit courts of all penal cases, the punishment of which is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, or both."

Section 143 of the Constitution in terms restricts the criminal jurisdiction of a police court, within corporate limits of a town or city, to what may be by statute conferred on a justice of the peace; and it seems to us, according to a fair construction, it was not intended the former should have exclusive jurisdiction of any crime or offense denounced and punishable by statute of the State, of which the latter has not also exclusive jurisdiction; nor does section 3513, Kentucky Statutes, properly construed, invest a police court with exclusive jurisdiction of the offense in question or any other specified and made punishable by statute of the State.

Various offenses are there mentioned, as well as certain ones punishable by statute, as others made offenses by municipal ordinances; but as to each offense punishable by statute jurisdiction of the police judge was evidently intended to be concurrent, for the only portion of that section which gives to him exclusive jurisdiction is in these words: "He shall have exclusive jurisdiction of all offenses or causes arising out of ordinances enacted by the council for the enforcement of the powers granted them by law." It seems to us plain the offenses and causes there referred to are such as have origin and existence in virtue of ordinances applicable to the municipality and independent of any statute of the State.

In our opinion the circuit court has jurisdiction of this case, and for error in dismissing the prosecution the judgment is reversed for further proceedings consistent with this opinion.

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CASE 7—PETITION ORDINARY—MARCH 11.

Wm. Glenny Glass Co. v. Taylor, &c.

APPEAL FROM BRACKEN CIRCUIT COURT.

1. PLEA OF NO CONSIDERATION—WHEN NOT AVAILABLE.—Where the evidence discloses that a note was executed to the payee by the two obligors, who were brother and sister, for the purpose of enabling the payee to raise money for the use of one of the obligors, and the money was so raised and used, the plea of no consideration is not available.
2. EXECUTION OF NOTE—CONTRACT—INTENTION OF PARTIES MUST CONTROL IN DETERMINING WHAT LAW GOVERNS THEIR RIGHTS.—Where a note is made payable at a bank in New York, but was executed by one obligor in Washington, D. C., and the other in Kentucky, and mailed to the payee in New York, and afterwards assigned to Ohio parties, the law of Kentucky controls and not the law of New York. The intention of the parties must control in determining what law is to govern their rights under the contract, whether the law of the place where the contract was entered into or the law of the place where it was to be performed.
3. PRACTICE—WHEN MOTION TO DISMISS TOO LATE.—After a case has been argued and submitted, it is too late for the plaintiff to enter a motion for dismissal.

ED. DAUM, H. C. WEAVER AND WM. H. HOLT FOR APPELLANT.

1. When a note is given in one State, payable in another, the parties may contract with a view to the interest laws in either; and where under the laws of one of the States the contract is valid, and void under the laws of the other, the courts will assume they were contracting with reference to the laws of the State where the contract is valid. (2 Kent, p. 260; 28 Fed. Rep., 265; Security Co., v. Vader, 96 U. S., 51; Cromwell v. County of Sac, 3 Pinney, 78; Fisher v. Otis, 19 S. C., 583; Thornton v. Dean, 11 Iowa, 1; Butter v. Olds, 13 Wis., 198; 81 N. Y., 566; 91. N. Y., 124.)
2. Where the rate of interest at the place of contract differs from the rate at the place of performance, the parties may contract for either rate, and the contract will control; or they may agree upon the rate of the place where the contract is made. (Cromwell v. County of Sac, 96 U. S., 62; Butters v. Olds, 11 Ia., 1; Fisher v. Otis, 3 Pinney, 78.)

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GEORGE DONIPHAN AND THOS. H. HINES FOR APPELLEES.

1. If by the law of the State where a contract is made it is legal, it is valid everywhere. But the law of the place where it is made yields in some respects to that of the place of performance, and it will be presumed that the contract was made with reference to and in view of the laws of the place of performance. (Daniels on Negotiable Instruments, sec. 879; Andrews v. Pond, 13 Pet., 65.)
2. An agreement to perform an act at a particular place is presumed to be made with reference to the law of the place of performance; and a contract referring by its own terms to a particular place where it is to be performed should receive its construction and legal character from the laws of that place. (Short v. Trabue, 4 Met., 401; 7 B. M., 577; 8 Bush, 199; 14 B. M., 448; 8 B. M., 307; Story's Conflict of Laws, secs. 233 and 234; 6 Pet., 203.)
3. In McAllister v. Smith, 17 Ill., 320 (65 Am. Dec., 651), it was held that a bill drawn in Illinois and made payable in New York, which was void under the laws of New York, was also void in Illinois.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This action at law was instituted by the appellant, the William Glenny Glass Co. against the appellees, Mary D. and Chas. Taylor, in the Bracken Circuit Court on the following note:

"$200.00 WASHINGTON, D. C., Jan. 2, 1891.

"Eighteen months after date we, jointly and severally, promise to pay Margaret E. B. Thompson, or order, two hundred dollars for value received, with interest at eight per cent. per annum until paid. Payable at the Fourth National Bank, New York, N. Y. "THOMAS P. DUDLEY.

"MARY D. BRADFORD."

At the time the note was executed by Mary D. Bradford she was a single woman, but subsequently married co-defendant, Chas. Taylor, who, as is alleged, by reason of his marriage, received property, cash, notes, etc., more than

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sufficient to pay the note in controversy. It is also alleged that the wife owned a tract of land out of which the debt could be made. They ask for judgment and all proper relief.

The defendants resist the recovery on two grounds. The first is a want of consideration; the second that, by the laws of New York, where the note was made payable, the exaction or the agreement to pay a greater rate of interest than six per cent. renders the note or obligation void, and such seems to have been the statute of that State when this note was executed and at the time of the institution of this suit.

As to the plea of no consideration, it appears from the testimony that the principal obligor in the note, Thomas P. Dudley, is a brother of Mary D. Bradford (now Taylor), and the note was executed and forwarded by mail to Mrs. Thompson, in New York City, and payable at the Fourth National Bank, to enable the latter, Mrs. Thompson, to raise means for Dudley, who, at that time, was in pecuniary trouble, or in such a condition as required pecuniary aid. Mrs. Taylor says the money raised on the note was used by Mrs. Thompson for her own purposes, her brother receiving no benefit from the proceeds. She only speaks of what she herself knew in regard to the transaction, and evidently had no means of knowing whether the money was or not applied to the benefit of her brother.

The appellant, the assignee of the note, stated that Mrs. Thompson said or wrote to the effect that she wanted the money to aid her in getting a pension, and she admits that she so wrote, but swears that every dollar of the two hundred was applied to the use and benefit of the appellee's brother; and if she was making a false statement it could have been easily disproved by him. He was never examined as a witness, and, with this positive proof of Mrs.

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Thompson, we are satisfied the money received was applied as intended by all the parties to the paper.

The consideration being clearly shown, it is only necessary to determine whether or not the judgment below is sustained by the evidence. There was no separation of the legal findings from the findings of fact; but if there was no evidence for the defense, the judgment for the appellees must be reversed.

The brother, for whose benefit the note was executed, signed and delivered the note in Washington City, and, by Mrs. Thompson, was enclosed to his sister at her postoffice in the county of Bracken, in this State, where she resided, and there signed and forwarded to Mrs. Thompson, in New York City.

It is well established that a contract, valid at the place where it is made, is valid everywhere; and also well settled that, if executed with a view to and in reference to the law of the place of performance, it is to be governed by the law of the place of performance; and, upon this recognized doctrine, it was held below that, although there was a bona fide consideration for the execution of the note, and the proceeds actually applied as intended by all of the parties to the paper, as it was made payable at the Fourth National Bank, in New York, and was enclosed in a letter to the payee directed to her in that city, it was an obligation to be controlled, so far as its validity was concerned, by the statute of that State, that provides: "All bonds, bills, notes, etc., * * * whereupon or whereby there shall be reserved or taken, secured or agreed to be reserved or taken, any greater sum or value for the loan or forbearance of any money, etc., than as above prescribed (which is six per cent.), shall be void," etc. Not only so; by another sec-

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tion of the statute, the chancellor, upon application, will cancel the note and require it to be delivered over.

This court will take judicial notice of the rate of interest in this State, and the law applicable to contracts where a greater sum than six per cent. interest is agreed to be paid, and will also presume, in the absence of any plea and proof to the contrary, that the note was valid under the law of the place where it was executed by Dudley, and the purpose being to raise money for the latter's benefit, and there being no indebtedness created in New York by the obligors to the payee in the note, it must be assumed from the evidence that the parties never contemplated that the law of the State where the note was to be paid should determine its validity. The money was not in fact advanced by the payee on the note, but was assigned to the appellant, who resided in the State of Ohio, and the money paid by it to Mrs. Thompson for the note paid over to Dudley, for whose benefit it was executed.

The mere fact that the note was made payable in New York and received by the payee in that city, under the circumstances of this case, is not sufficient evidence of the fact that it was intended the law of that State should govern, or its validity to be tested by the statute in regard to usury. We will not assume, nor does the evidence authorize such a conclusion, that the brother living in Washington City and executing the note in that place, and his sister executing the note in Bracken county, Ky., regarded or expected their liability to be determined by the statute of New York, and when sued in Kentucky could defeat the recovery upon the paper on the ground that the charge of the extra interest rendered the entire obligation void.

The note, when signed by Mary D. Bradford in Kentucky, and inclosed to the payee, was an executed instrument, as

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much so as if the payee had been present and the note delivered to her in Kentucky.

As said in Wayne County Savings Bank v. Lord, 81 New York, 572, "it can not be contended that a party who goes into another State, and there makes an agreement with a citizen of that State for the loan or forbearance of money, can render his obligation void by making it payable in another State, according to whose laws the contract would be usurious."

In the case of Vliet v. Camp, 13 Wis., 198, it is said:" The law of the place of payment does not necessarily govern the rate of interest which may be contracted for."

It is a question of intention, and all the facts must be considered in order to determine what law the parties looked to as controlling their rights under the contract, whether the law of the place where the contract was entered into or the law of the place where it was to be performed; nor is the rule here recognized in conflict with the cases heretofore decided by this court in Goddin v. Shipley, 7 B. M., 575; Hyatt v. Bank of Kentucky, 8 Bush, 193; Young v. Harris, 14 B. M., 447.

Ordinarily the place of performance fixes the nature and interpretation to be given the contract, and, as said in the case of Young v. Harris, if the payee of a note residing in Covington, Ky., endorses it in blank at that place and puts it in his pocket, and after this goes to Cincinnati, and there sells and delivers it to another, who pays him the consideration, the mere physical act of endorsement, although performed in Covington, forms no contract, but it is the transaction in Cincinnati that creates the contract, and, therefore, the law of Ohio must govern.

In this case we are asked to forfeit the principal and interest of a note executed out of the State of New York, and

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doubtless the proceeds used out of that State, in the hands of one to whom it was assigned, by a payee having no beneficial interest in the proceeds, but who had agreed to become the payee and perhaps to advance the money to meet the necessities of one of the obligors, who was the brother of the other, and to do so would be, in our opinion, to enforce a law of a State other than that in which the note was fully executed, and by which (the Kentucky law) this legal effect of the transaction must be governed.

It is contended that the appellant in its reply failed to controvert the statement in the answer that the note was executed with reference to the law of New York. The reply avers that the note was executed by the brother in Washington City, and by the sister in the State of Kentucky, and without any reference whatever to the laws of the State of New York, and that the law of the latter State had nothing to do with the execution and delivery of the paper, save that it was made payable at a bank in that city.

The isues were fully made up, and while we are satisfied the court below determined this case upon the question as to whether the law of New York or the law of this State governed, as his view of the law is not in the record as a separate finding, we must dispose of the case as if it had been tried by a jury without instructions, or the instructions omitted from the record; and if the evidence is conflicting the judgment must be affirmed.

We have already indicated that the testimony is all one way, and upon the facts the judgment should have been for the plaintiff.

After the case had been argued and submitted the appellant, seeing that the inclination of the court was to decide for the defendant, asked leave to discontinue the case; and this was refused, and properly, as held by this court in the

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case of Vertrees' adm'r v. R. Co., 95 Ky., 314. It is too late after submission to enter such a motion.

As the appellee made some effort to show an improper application of this money, as the case must be retried, there is nothing to prevent a full and fair hearing on this branch of the controversy.

Judgment reversed and remanded for a new trial and for proceedings consistent with this opinion.

CASE 8—PETITIONS EQUITY—MARCH 13.

Tyler v. Tyler, &c.
Same v. Same.
Same v. Same.

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110 202
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122 254
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134 702
135 203

APPEAL FROM NELSON CIRCUIT COURT.

1. ALIMONY—COLLECTION THEREOF BY EXECUTION.—Section 2123 of the Kentucky Statutes, which prohibits a chancellor from making an order or rendering a judgment in a divorce suit, "which shall divest either party of the fee-simple title to real estate," does not prohibit the levying of an execution on such real estate for the purpose of collecting an allowance for alimony.
2. The allowance for alimony, under the circumstances of this case, was reasonable.

GEO. S. FULTON AND C. T. ATKINSON FOR APPELLANT.

1. Under the facts and circumstances in this case, the allowance for alimony was out of all reason.
2. Section 2123 of Kentucky Statutes has been plainly violated in this case, as it is distinctly provided therein that the court shall not divest either party of the fee-simple title to real estate.
3. An allowance or allotment of alimony is not a judgment upon which an execution may issue.

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JOHN S. KELLEY FOR APPELLEE.

1. The facts of each particular case will control the chancellor in determining the amount of allowance for alimony. (Beall v. Beall, 80 Ky., 680.) In this case the facts and circumstances show that the allowance was reasonable.
2. The appellant was not "divested of the fee-simple title to real estate," as was contemplated by sec. 2123 of Kentucky Statutes; the court, in its judgment, did not undertake to adjudge a transfer of the fee-simple title to real estate from appellant to appellee, but gave appellee a judgment *in personam* for alimony, which she proceeded to collect in the usual way by levy on his property.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

These three cases have been consolidated and considered as one case. The appellant was sued by his wife for a divorce. She obtained the relief sought, and alimony allowed her to the extent of $1,200, and was given the custody of her infant child.

The appellant at the time of the rendition of the judgment, and in fact prior thereto, had made an assignment of all his estate for the benefit of creditors, but was not in fact insolvent. He owned a valuable farm, house and lot in Bloomfield, and personal property, and at the date of the judgment, at a fair estimate of his estate, would have had property left of the value of about $3,000, and, upon the hearing, the testimony as to the value of the estate fully justified the judgment for the amount awarded as alimony.

His farm had been sold for a good price, but it seems the purchaser failed to give bond, and, the sale having been set aside, on a resale the farm brought a thousand dollars less money. His other property was sold, and brought much less than its value, and when his estate was wound up he had left about $250 in money and his house and lot in Bloomfield, worth about $1,200, and his remedy against the

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first purchaser of his land to recover the difference between his bid for the farm and what it sold for at the last sale. Before this was ascertained his wife (the appellee) had an execution issued for the allowance made to her of the $1,200 that was levied on the house and lot in Bloomfield and sold for $1,100 or about that sum, one Mrs. Lewis being the purchaser, who is also an appellee.

The wife nor her infant child had any estate, and the details of the many wrongs by the husband toward the wife, so cruel and inhuman, take from this case any equitable claim by the husband on this property, when its effect would be to deprive the mother and infant of any means of subsistence.

The original judgment, from which is one of the appeals on the record, was all proper, and sustained by the proof,and the second and third appeals were from a judgment refusing to modify or lessen the allowance on the motion or petition by the husband in the nature of a bill of review or for a new trial, and also from the judgment refusing to quash the execution and set aside the sale made to Mrs. Lewis to satisfy the alimony. A judgment had been rendered for the amount, and an execution directed to be issued in the original case.

The ground for lessening the allowance is that the property, when sold, did not bring as much as it was really worth, or not as much as it had been valued at by the appellant himself when disclosing the value of his estate.

The right of the chancellor to make the allowance is unquestioned, and to enforce its collection by execution, but it is contended that section 2123 of the Kentucky Statutes prohibits the chancellor from making an order or rendering a judgment in favor of the wife or the husband (whichever is in fault) by which either shall be divested of title to real

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estate, or, as the statute reads, "but no such order for maintenance of children or allotment in favor of the wife shall divest either party of the fee simple title to real estate," and it is therefore, said the chancellor, by permitting the execution to go and the realty of the appellant sold under it, has done by indirection what the statute in express terms forbids him from doing.

The judgment does not by its terms or in substance divest the husband of title to his realty, but makes him an ordinary debtor to the wife for a fixed sum of money that his estate is liable for in the same manner that it would be for a debt due upon any contract.

If the construction of the statute is adopted as is insisted it should be by counsel for appellant, then if the rental value of the realty of the husband is insufficient to pay the allowance or the interest upon it the wife is without relief, except by rule to enforce payment, and upon the failure to pay under such a proceeding the imprisonment of the husband would add nothing to the support of his wife and child.

When the marriage tie was severed by the chancellor and the judgment rendered for the alimony in favor of the wife, the husband became her debtor for the amount, and on his failure to pay an ordinary execution could go under this judgment and realty or personalty sold in satisfaction of it.

The chancellor, therefore, if he had the power, would not be disposed to disturb this judgment in any way. It is a small pittance for the wife and child, made penniless by the bad conduct of the appellant.

The judgment on each appeal is affirmed.

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CASE 9—INDICTMENT—MARCH 19.

Arthur v. Commonwealth.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. HOUSEBREAKING.—An indictment under section 1162 of the Kentucky Statutes, which charges the defendant simply with breaking and entering a dwelling-house with intent to steal, without alleging that there was anything stolen and taken therefrom, does not charge a felony within the meaning of that section. It is an essential part of the crime designated in that section, that something of value should be taken away from the house.

W. H. JULIAN AND HUGH RODMAN FOR APPELLANT.

1. If the facts charged in the indictment do not constitute a felony under our statutes, the motion in arrest of judgment should have been sustained, because at common law house-breaking was only a misdemeanor. ((Mullins v. Commonwealth, 14 Ky. Law Rep., 569.)
2. The facts charged in the indictment do not constitute a felony by virtue of section 1162, because it is not charged that anything of value was taken from the house.
3. They do not constitute a felony under section 1164, because the provisions of that section do not apply to dwelling-houses.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant was indicted, tried and convicted of the crime of housebreaking, alleged to have been committed by his unlawfully and feloniously breaking and entering into a room occupied by Mrs. Kate Williams as part of her dwelling house, with the felonious *intent* to steal therefrom property of value.

At the trial he moved the court to instruct the jury to acquit him; but his motion was overruled. He also made a motion in arrest of judgment, which was likewise overruled.

As there is no bill of evidence before this court, the only question to decide is whether the facts stated in the indict-

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ment constitute a public offense within the jurisdiction of the court.

The indictment was evidently found and appellant convicted under section 1162, Kentucky Statutes, which we copy entire as follows: "If any person shall feloniously take out of or from any church, chapel or meeting-house, schoolhouse, courthouse or other public building, any goods or chattels or other thing of value belonging thereto, or shall rob any person in his dwelling house, or place, or in any booth or tent in a fair or market, he, his wife, children or servants or other person then being within, or shall feloniously break any dwelling house or any part thereof, or any outhouse belonging to or used with any dwelling house, *and feloniously take away anything of value*, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

It will be observed that to constitute a complete offense under that section there must be a felonious taking out of a church or other building of that class a thing of value, or robbery of a person in his dwelling house or other place of that class, or felonious breaking a dwelling house and feloniously taking away a thing of value; and that it does not make any difference what may have been the intent with which any of the places mentioned in that section were entered, except there must be a felonious breaking of a dwelling house.

According to sections 1163 and 1164 entering any place mentioned therein with mere intent to steal therefrom a thing of value is a felony, though no overt act be done; and the fact that the statute in terms makes it a felony to enter places described in those two sections, whether anything be stolen therefrom or not, makes it plain, if it was not already so, that the legislature intended that, to constitute a

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felony under section 1162, there must be actually a felonious taking from a dwelling house a thing of value, without regard to the intent with which it was entered or even broken.

As, therefore, the indictment in this case charges simply a breaking and entering the dwelling house with intent to steal, without stating there was anything stolen and taken therefrom, the motion for an instruction to acquit ought to have been sustained; but, as that was not done, the additional error was committed by the court in overruling the motion in arrest of judgment; for appellant was not guilty according to the statement in the indictment, of a felony, but only a trespass or breach of the peace. if guilty of any offense.

The judgment is reversed for further proceedings consistent with this opinion.

CASE 10—PETITION ORDINARY—MARCH 20.

Sterritt v. McAdams.

APPEAL FROM HANCOCK CIRCUIT COURT.

1. CIRCUIT CLERK—WRIT OF ELECTION TO FILL VACANCY.—Section 1528 of the Kentucky Statutes, in so far as it applies to the issuing by a circuit judge of a writ of proclamation for an election to fill a vacancy in the office of circuit clerk, is only directory, and it is not essential to the validity of such an election that such a writ should be issued.
2. In case of such vacancy the Constitution, in express terms, fixes the time for holding the election. and it will be presumed that the voters knew of the death of the incumbent, and that an election must follow. But in cases where the time and place for holding the election must be designated by the one authorized to call it, the rule would be different.

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SWEENEY, ELLIS & SWEENEY FOR APPELLANT.

1. When a power is given by statute to public officers, and the public interests and individual rights call for its exercise, though merely permissive in form, it is in effect mandatory. (Bowen v. City of Minneapolis, 47 Minn., 115; Supervisors v. United States, 4 Wall., 419.)
2. In States having constitutions like our own providing that no special law shall be enacted where a general law can be made applicable, it has been held that all statutes of a general nature are mandatory and must be so construed. (State v. Ellet, 47 Ohio St.)
3. The mode of getting rid of a statutory provision by calling it directory is not only unsatisfactory on account of the vagueness of the rule, but it is the exercise of a dispensing power by the courts which approaches so near to legislative discretion that it should be resorted to with reluctance. (Koch v. Bridges, 45 Miss., 258.)
4. Where a vacancy is to be filled, and there is a failure to give notice, the election is void. (6 Am. & Eng. Enc., pp. 293 to 379, and cases there cited.

GEO. W. JOLLY, W. S. MORRISON, E. C. VANCE, AND HORACE JOLLY FOR APPELLEE.

1. When a vacancy exists in an office which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall specify the vacancy to be filled, an election at that time and place to fill the vacancy is valid, notwithstanding the notice is not given. (Berry v. McCullough, 94 Ky., 247; Cooley's Const. Lim., 758-9; Shelley v. McCullough, 15 Ky. Law Rep., 53; Trustees of Augusta v. Maysville, &c., R. Co., 30 S. W. Rep., 1; Toney v. Harris, 85 Ky., 475; Doores v. Varnon, 22 S. W. Rep., 853.)
2. The voice of the people is not to be rejected for a defect, or even want of notice, if they have in fact been called upon and have spoken. (Deshon v. Smith, 10 Ia,. 212; People v. Cowles, 13 N. Y., 339; State v. Jones, 19 Ind., 356; Speed v. Hartwell, 12 Mich., 508; Chicago v. People, 80 Ill., 496; LaFayette v. State, 69 Ind., 218; People v. Wetherill, 14 Mich., 48; Commonwealth v. Smith, 132 Mass., 289; People v. President, &c., 30 N. Y., 265; People v. School Dist., 102 Cal., 184; State v. Carroll, 17 R. I., 591; Adams v. Sec. of State, 84 Mich., 420; Wheat v. Smith, 50 Ark., 266.)
3. If a statute simply provides that certain things shall be done with-

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in a particular time, or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and only directory if they do not. (Parvin v. Wineberg, 130 Ind., 561; McCreary on Elections, sec. 190; Barnes v. Board, 51 Miss., 305; Wheelock's Case, 82 Pa. St., 297; Ledbetter v. Hall, 62 Mo., 422; West v. Ross, 53 Mo., 350; Jones v. State, 1 Kan., 273; Gilleland v. Schuyler, 9 Kan., 569.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

In November, 1895, at a regular election, as provided by the Constitution, the appellee, Charles McAdams, was elected to fill the unexpired term of the office of circuit court clerk of Hancock county, made vacant by the death of R. L. Chambers, who had been elected in November, 1892.

Chambers died on the 19th of November, 1894, leaving three years or more of the term of office to be filled. A part of the term was filled by an appointment by the circuit judge until the regular election, which took place in November, 1895. There were three candidates for the vacancy—Sterrett, the appellant, who had been appointed, Charles C. McAdams and John Owens—all of whom were voted for at the polls, McAdams receiving 767 votes; Will L. Sterrett, 632 votes; and John Owens 229 votes. The regularly constituted board canvassed the returns, and gave to the appellee, McAdams, a certificate of his election. He executed bond, took the oath of office, and demanded of the appellant, Sterrett, the custody of the books, records and papers of the office, and his demand was refused on the ground that no proclamation had been issued, or an election called by the circuit judge of that county to fill the vacancy. This is the only question involved on the appeal.

It appears that fully ninety per cent. of the voters cast their votes at the election, and that it was conducted in

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every respect as required by law, with the exception that no writ of election had been issued.

Section 1528 of the Kentucky Statutes provides that "a vacancy in the office of Commonwealth's attorney or circuit court clerk shall, in like manner, be temporarily filled for the same time by the circuit judge of the district, who shall also issue his writ of proclamation for an election to fill the remaining vacancies."

The circuit judge had the power to make the appointment, as is conceded, until the regular election in November, 1895, and his power of appointment then ceased, or the appointee's right to continue in office then ended; so if a failure to issue the writ of election renders the election void, there was no clerk for the county after November, 1895, or if the failure to call an election authorized the appointee to continue the discharge of his duties, it would result that the action of the judge would deprive the voters of their right to fill the vacancy and vest in the judge the power to fill the vacancy for the whole of the unexpired term.

It is insisted by counsel there is a difference between a regular election to fill the whole term and a special election to fill the vacancy. In the first instance the voters must take notice of the time for holding the election as fixed by the Constitution, but in the second a notice is required, that the voters may know there is a vacancy to be filled and an election to be held. Where there is a vacancy in a case like this the Constitution in express terms fixes the time for holding the election; and, as to the notice of the vacancy, it appears that there was an appointee until this regular election, and it must be presumed the voters knew of the death of Chambers, and that an election must follow; but whether they were informed as to the time for holding the election or not, it is admitted the appellant was elected to fill a va-

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cancy, having more than three years to run from the death of Chambers; that an election was held at the time and places required by law to fill the vacancy; that the appellee was qualified for the position, and received the highest number of the votes cast, after the candidate of each party had been selected in a primary election, and voted for at the regular election, and, with these facts conceded, the election must be held valid.

The failure of the circuit judge to issue his proclamation, when the law fixed the time for holding it, does not make the election void. It is merely directory in this class of cases and not essential to the validity of the election, and such should be the construction, for if otherwise the county would be without a clerk, as the power to appoint had already been exhausted, and the time for holding under the appointment expired.

In cases where the time and place for holding an election must be designated by the one authorized to call it, the rule would be different; but here there was a free and full vote at a time fixed by law, and no other time could have been designated by the circuit judge, and to say that his failure to issue the writ is to defeat the right of the appellee to his office would be sacrificing substance to form, and work an injustice to the appellee and those who sought by their votes to give him the office.

This question was in effect decided by this court in the case of Berry v. McCullough, 94 Ky., 247, and Shelley v. McCulloch, 17 Ky. Law Rep., 53, holding the election valid.

Judgment affirmed.

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CASE 11—PETITION ORDINARY—MARCH 21.

Brady v. Peck.

APPEAL FROM GRAVES CIRCUIT COURT.

1. WARRANTY OF TITLE—SUFFICIENCY OF ALLEGATION FOR BREACH.—In an action for breach of covenant of warranty of title to land, where the deed containing the covenant is filed with the petition, it is sufficient to allege in the petition the substance of the covenant, without setting it out in the express terms used in the deed. And an allegation in such a petition that the defendant in the deed "warranted the title against all persons whatsoever" is sufficient, although the only covenant in the deed was that the title was conveyed "with covenant of general warranty."
2. VENDOR AND VENDEE.—An arrangement between the defendant in a suit for breach of covenant of warranty, and his vendor, can not affect the rights of the plaintiff, and can not constitute a valid defense in such an action.
3. DISCRETION OF COURT IN PERMITTING AMENDED PLEADINGS TO BE FILED.—The court did not abuse its discretion in refusing to permit the defendant to file the several amended answers which were tendered, because the facts stated in the amendments must have been known to the defendant at the time his original answer was filed, and should have been alleged therein, and especially where neither of the proposed amendments contained a statement of facts which, if true, would have constituted an available defense.
4. PRACTICE—FILING AMENDED PLEADINGS.—The question as to the sufficiency of an amended pleading may be properly raised either by objecting to the filing thereof when it is offered, or by insisting on the demurrer after it is filed.

D. G. PARK FOR APPELLANT.

1. The allegation of the petition that "by the terms of the deed he warranted the title to said land against all persons whatsoever" is only a conclusion of law, and is not a sufficient allegation of a covenant or agreement of warranty. The pleader must aver the terms of the agreement so that the court may determine from the petition, without resorting to the exhibit whether or not the title was warranted. (Murphy v. Estes, 6 Bush, 532; Stiners v.

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Baker, 87 Ky., 508; Chitty on Pleadings, vol. 1, 16 Amer. Ed., 381; Huffaker v. Bank, 12 Bush, 290.)

2. The appellant's answer stated that he was not in fact the owner of the land when he conveyed it, and that another was the owner and received all the purchase price therefor; and the demurrer thereto should have been overruled.
3. The true rule for the measure of recovery in a suit for breach of covenant of warranty is the value of the land at the time of the conveyance; and while the best evidence of that value is the price stipulated by the parties, yet the nature of the consideration may be inquired into by evidence *aliunde*, and its real value ascertained. (Robertson v. Lemon, 2 Bush, 301: McKean v. Read, Littell's Select Cases, 400; Marshall v. McConnell, 1 Littell, 424.)

SAME, IN PETITION FOR RE-HEARING.

1. The fact that the "deed is filed and referred to" does not aid the pleading in any respect. (12 Bush, 325, 14 B. M., 67; 1 Met., 431; 6 Bush, 533.)

W. W. ROBERTSON FOR APPELLEE.

1. A defendant in a suit for breach of covenant of warranty, who admits the execution of the deed, is estopped from denying the existence of the sale which is evidenced by the deed.
2. The criterion of recovery in such a case is the value of the land as fixed by the parties, and the recitals of the deed as to the consideration must control. (9 B. M., 58; 17 B. M., 85; 4 Dana, 253.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The action was for breach of covenant of warranty of title to a tract of land situated in the county of Carlisle, which the appellant sold and conveyed to the appellee. The land had been sold and conveyed by Mrs. Gray, a married woman, to Carrico, and by the latter to the appellant. The husband of Mrs. Gray did not join with her in the sale and conveyance, and they sued the appellee in ejectment to recover the land, and obtained judgment for it, under which the appellee was evicted.

The petition alleges, and the deed which is filed with it

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as an exhibit shows, that the consideration paid by appellee to appellant for the land was the sum of "three hundred and fifty dollars in cash," for which judgment was prayed. The covenant of warranty, the breach of which is alleged, is set up in the petition in these words: "And by the terms of the deed which defendant made plaintiff he warranted the title to said land against all persons whatsoever."

The covenant made in the deed is in these terms: "To have and to hold the same, with all appurtenances thereon, to the second party, her heirs and assigns forever, with covenant of general warranty."

The answer contains a denial that the land was worth the consideration recited and acknowledged in the deed and alleged in the petition; further denied that appellant sold the land to appellee, or that the latter paid him any part of the purchase money, but alleges that appellee paid the purchase money to Carrico, the vendor of appellant. It admits that appellee was evicted by Mrs. Gray, and sets up the sale and conveyance of the land to appellant by Carrico, by deed of general warranty, for the consideration of the sum of one hundred and seventy-five dollars paid by appellant to Carrico, and it is made a cross petition against Carrico, and prays for judgment in favor of appellant against him "for the value of said land, and whatever amount the plaintiff may recover, and that he have judgment for three hundred and fifty dollars and costs."

The plaintiff filed a general demurrer to the answer, which, on motion of defendant, was taken back to the petition. The lower court sustained the demurrer as to the answer, but overruled it as to the petition, and this is claimed by counsel for appellant to be error.

The answer does not attack the genuineness of the deed executed by appellant to appellee for the land, nor does it

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contain a denial that the appellee paid the purchase money recited in the deed. It is denied, *first*, that appellant *sold* the land to appellee; and, *second*, that the appellee paid *to him* the three hundred and fifty dollars purchase money, the latter coupled with the admission that she did pay it to Carrico. These denials, it is plain, do not controvert any of the material allegations of the petition, for the fact remains that appellant executed and delivered the deed containing the covenant of warranty sued on, and it must be presumed that the purchase money, if paid to Carrico as stated in the answer, was paid to him by the consent or direction of appellant; and, under these circumstances, the allegation that the land was not worth the amount of the purchase money which the answer admits was paid by appellee for the land, even if that allegation were true, is irrelevant, and can avail nothing by way of defense.

But it is claimed that the petition contains no sufficient statement of the terms of the warranty and that the statement in general form that "by the terms of the deed" the plaintiff warranted the title to said land against all persons whatsoever was not sufficient. Counsel claims as we understand it, that the covenant as written in the deed, ought to have been set out in *hæc verba* in the petition, and that the statement contained in the petition, with reference to the covenant, is a mere conclusion of law.

We can not concur with counsel in their view of the case. The covenant, as quoted from the deed, is "with covenant of general warranty." This form of expression is, by the statute, equivalent to a covenant in terms to warrant the title "against the claims and demands of all persons whatever;" and is, in effect, a "general warranty" of the title (Kentucky Statutes, section 493). So that we hold that it is immaterial whether the allegation or statement of the covenant in

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such cases is in the terms of the covenant as written in the deed, or as allowed and made effective by the statute; and that, in either case, where the deed is filed and referred to containing the covenant sued on, a statement of the substance of it is sufficient. Our conclusion, therefore, is that the court did not err in sustaining the demurrer to the answer, and in overruling it as to the petition.

The demurrer to the answer having been sustained, the defendant, being allowed to amend, presented and offered to file in succession three different amendments, which were successively refused by the lower court, and this action is likewise complained of as error by counsel for the appellant.

We are not able to find that the court erred in refusing to permit those amendments to be filed. If the facts set up, by way of defense, in these several proposed amendments existed, and were in the knowledge of the defendant at the time the original answer was filed, they ought to have been alleged in the answer, and, under the circumstances, it was no abuse of discretion on the part of the court to refuse to permit the amendments to be made, as was proposed in this case; but, aside from this, neither of the proposed amendments contained a statement of facts which, if true, the defendant could have been allowed to avail himself of in defending the action.

The rights of appellee could in no way be affected by any arrangement between the appellant and Carrico, his vendor, by which, on a resale of the land by the appellant to the latter, the appellant undertook to convey it by general warranty to the appellee, to whom it is claimed Carrico, and not the appellant, sold it; and no fact is set up in either of the proposed amendments tending to show that the appellee was guilty of perpetrating a fraud on the appellant. It must be presumed that the agreement was that the appel-

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lant was to convey the land to appellee by deed of general warranty, which he did, and that the agreed value of the land was the consideration set forth in the deed.

Appellant must have known this. He could have avoided all liability in the premises by confining his covenant to a special warranty. Failing to do this, and instead thereof having covenanted to warrant the title generally, he is bound by it. The lower court gave him a judgment on his cross-petition against Carrico, his vendor, for the precise sum adjudged to the appellee against him.

And finding no error, the judgment of the lower court is affirmed.

The following response to a petition for re-hearing was delivered:

Per Curiam. Counsel for appellant, in his petition for a rehearing of this cause, still insists that the covenant of warranty was not sufficiently alleged in the petition, and that, therefore, the petition did not state a cause of action. After a careful review of the opinion we adhere to what was held on that point. It would not have been improper to set out in the petition the exact terms (*verbatim*) of the covenant contained in the deed, although other allegations might have been necessary to make up a complete statement of the cause of action; but here the fact of the warranty was stated, and the original deed was filed and referred to as an exhibit, which established the fact alleged, and this was accompanied with a statement of the covenant substantially in terms that are allowed and defined by the statute as a "general warranty."

The opinion does not hold, as it seems counsel construes it, that the filing of the deed containing the covenant was alone sufficient without further statement of the terms of the covenant. It was said that the statement of the sub-

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stance of the covenant, whether as written in the deed or as allowed and made effective by the statute, where the deed was filed and referred to, was sufficient, and that this is correct there can be no doubt. The filing of the deed or writing alone is not sufficient, but under the Code the plaintiff was required to file it. (Civil Code, section 120.)

Counsel has overlooked the fact that in the answer and cross petition, on which recovery was sought over against Carrico, appellant's vendor, in the event appellant was held liable on his covenant to appellee, the statement of the warranty was that Carrico had sold and conveyed the land to appellant "*by deed of general warranty*," by which "Carrico *warranted the title* of said land to him." Counsel doubtless considered this statement sufficient to base a recovery on, and the lower court, being of the same opinion, gave a judgment on the cross petition against Carrico in favor of the appellant.

Counsel also still insists that the lower court erred in refusing to permit the three amended petitions to be filed. It is true that when the court sustained the demurrer to the answer leave was given to amend, and if either of the amendments offered had contained a good defense to the action doubtless the court would and ought to have permitted it to be filed. Still it was in the discretion of the court to require all facts material to his defense, and within the knowledge of the pleader at the time the pleading was offered to be filed, to be embraced in one pleading.

It may be that the statement in the opinion, that the filing of the three amendments were "successively" refused by the lower court was inaccurate, as the refusal was by one order in the case; but that does not affect the question. In any event the court properly refused to permit either amendment to be filed because, as is sufficiently shown in

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the opinion, neither one, nor all of them together, contained a good defense to the action. As stated by counsel, it was competent to raise the question as to the sufficiency of the amendments by objecting to the filing when offered, or by insisting on the demurrer if filed. The question in this case was raised by the objection to the filing of the amendments, and the refusal of the court to allow them to be filed was not error.

The petition is overruled.

CASE 12—WARRANT—MARCH 24.

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City of Owensboro v. Simms.

APPEAL FROM DAVEISS CIRCUIT COURT.

1. PUNISHMENT OF COMMON-LAW OFFENSE BY CITY ORDINANCE.—The provision in section 168 of our Constitution that "no municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense" applies to offenses only for which a statutory penalty has been fixed. But the offense in question being punishable only at common law in this State, the municipal ordinance may fix a penalty therefor at less than the common law penalty.
2. POLICE COURTS—JURISDICTION.—Police courts in cities of the third class are given "exclusive jurisdiction of all prosecutions for violations of ordinances or by-laws of the city, occurring within the corporate limits of the city."

LA VEGA CLEMANTS FOR APPELLANT.

1. The framers of the Constitution and of the statutes certainly did not intend to take from the cities that part of their police power which is embraced in common law offenses. And the fact that the words "imposed by statute" are used in both the Constitution and statutes seems conclusive that common-law offenses, for

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which a penalty is not fixed by statute, were not intended to be included therein.

2. The keeping of a bawdy house in a city may be an offense against the city under an ordinance, and also an offense against the State. (Kemper v. Com., 8 Ky. Law Rep., 763.) It is true that case was decided prior to the passage of the present Constitution, which provides that "a conviction or acquittal under either shall constitute a bar to another prosecution for the same offense," but that provision only refers to and applies to those offenses for which a penalty is "imposed by statute."

BIRKHEAD & CLEMENTS ON SAME SIDE.

SWEENEY, ELLIS & SWEENEY FOR APPELLEE.

No brief in the record.

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The only question presented in this case is whether or not the police court of the city of Owensboro, a city of the third class, has jurisdiction to punish one found guilty under an ordinance of the board of council of the offense of keeping a bawdy house, or house of ill-fame, in said city.

It is a common-law offense, and there is no statute of this State that imposes a penalty for it. The offense is punishable, however, at common law upon indictment by fine and imprisonment, at the discretion of a jury. But city ordinance No. 45, which was passed by the board of council of the city and which was approved and went into effect on the 4th day of June, 1894, imposes a penalty for the offense committed within the limits of the city, and reads as follows:

"That any person or persons who shall, in the city of Owensboro, establish or carry on, or permit to be carried on, upon his or her property, any house of ill-fame, shall, upon conviction for each offense, be fined not less than twenty-five nor more than one hundred dollars; that each twenty-

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four hours same is carried on, or permitted to be carried on, shall constitute a separate offense under this section."

The appellee was charged and found guilty in the police court of Owensboro, under the foregoing ordinance, of the offense therein named, and a fine of twenty-five dollars was assessed and adjudged against her therefor; but, on appeal from that judgment to the Daveiss Circuit Court, that court, by its judgment, sustained a demurrer to the warrant, and dismissed the warrant on the ground that the police court had no jurisdiction of the said offense, and that judgment is before us on this appeal.

We can not concur in the view held by the lower court, that the police court of the city of Owensboro had no jurisdiction of the offense charged in the warrant against the appellee. A house of ill-fame is a bawdy house, and clause 13 of section 3290 of the Kentucky Statutes expressly empowers the common council of each city of the third class "to prohibit and suppress all gambling houses, disorderly houses and *bawdy houses*." * * *

By clause 22 of the same section the common council of each city of the third class is likewise empowered "to impose fines, forfeitures and penalties and terms of imprisonment for the violation of ordinances and by-laws." * * *

And by clause 40 of the same section authority is given, in general terms, "to carry out the full intent and meaning of this act, and to accomplish the object of this incorporation."

Full power is conferred upon the local authorities of those cities, by the act incorporating them, to provide, not only for the "general health, comfort and convenience" of their inhabitants, but also for "the morals and safety of the public;" and the method which the common council of the city of Owensboro, in its discretion, has chosen to prohibit

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and suppress this particular evil, which is detrimental to the morals of the public, is to render any person who shall "establish or carry on, or permit to be carried on, upon his or her property, a house of ill-fame" in the city, subject to the penalty of a fine.

This is not, as it is claimed, prohibited by section 168 of the Constitution, which provides that "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."

It will be observed that the restriction upon municipal legislation contained in this section of the Constitution is in respect of offenses to which a statutory penalty has been affixed. Undoubtedly if the General Assembly had by statute imposed a penalty for the offense of keeping a bawdy house greater than that fixed by the ordinance in question, the ordinance would be void under this section of the Constitution, and the police court of the city of Owensboro would have had no jurisdiction to fine the appellee for violating it; but since no statutory penalty has been provided for the offense, the common council of the city of Owensboro had the power, under the act incorporating cities of the third class, to pass the ordinance, and the police court of the city being invested by the act (Kentucky Statutes, section 3359), with "exclusive jurisdiction of all prosecutions for violations of the ordinances or by-laws of the city occurring within the corporate limits of the city," had jurisdiction to try and impose a fine upon appellee for violating the ordinance.

The question suggested by counsel, whether, in the absence of a statutory penalty, a conviction or acquittal of any one charged with a violation of the ordinance would be

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a bar to a subsequent indictment and prosecution for the same offense at common law, is not before us in this record, and we do not pass on it.

For the reasons given the judgment of the Daveiss Circuit Court is reversed and the cause remanded for further proceedings consistent with this opinion.

CASE 13—PETITION EQUITY—MARCH 25.

Miller v. Denny, &c.

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103 720

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

1. VENDEE'S RIGHT TO SELL—RESTRICTION THEREOF IN DEED.—Where it is provided in a deed by two vendors to a vendee that the vendee is not to dispose of his interest in the property conveyed without the consent in writing of the two vendors, the vendee can, nevertheless, convey and pass title to his interest therein to one of the vendors without the written consent of the other.
2. VENDOR'S LIEN FOR DAMAGE BY REASON OF VENDEE'S FAILURE TO PERFORM CERTAIN SERVICES WHICH WERE THE CONSIDERATION FOR THE DEED.—Where the deed shows that the vendee was to render certain service and perform certain work as consideration for the land, and the vendor has been damaged by his failure to do so, he can recover such damage and is entitled to a lien on the vendee's interest in the land for the payment of the same, and the lien is superior to the purchase-money lien, under the sale by the vendee to one of the vendors, although the notes for the same have been assigned to others.

W. O. BRADLEY FOR APPELLANT.

1. The office of the *habendum* is to limit and define the estate granted, and while, as a general rule, it must give way to the granting words of the deed when clearly contradictory of them, yet it should certainly be resorted to equally with the balance of the instrument, to arrive at the intention of the maker, which must

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govern when ascertainable. Where the intention does not appear, then the words of grant should govern, if repugnant to the *habendum*, but if the intention is apparent, then it should govern. (Henderson v. Mack, 82 Ky., 380.)

WM. HERNDON AND C. C. WILLIAMS FOR APPELLEES.

1. Contracts which attempt to destroy the power of alienation, especially those which seek to prevent the owner of real estate from disposing thereof as he wishes, are void. (Turner v. Johnson, 7 Dana, 440.) Miller's remedy in this case is against Ashby for a breach of the covenants contained in the writing.
2. Miller can not recover in this case because

(*a*). His pleadings do not state a cause of action against the Spillmans or Fish.

(*b*). The clause of the contract forbidding a sale of the land, was an attempted restriction on alienation, and, therefore, void.

(*c*). Denny, Spillman, nor Fish assumed the undertakings imposed upon Ashby by the writing; those undertakings were personal to Ashby, and not assignable.

(*d*). The only damages alleged are speculative, and the effort to prove them is in speculative language.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by John W. Miller from a judgment of the Rockcastle Circuit Court, rendered in the action of A. T. Fish against George Denny, John W. Miller, etc.

The claim of plaintiff is that one S. K. Ashby once owned an undivided third of the land described in the petition, and conveyed the same to George Denny, and that Denny executed the notes sued on for the balance of the purchase money due on the land, which notes were assigned to plaintiff. It also appears that Denny afterwards sold two-thirds of the land to one Spillman, who died, and the Spillman defendants hereto are his executors.

The appellant, Miller, answered, and made his answer a cross petition against Ashby, the plaintiff, and the Spillmans. His contention is that Ashby could not pass title to

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Denny, and that the land sought to be sold by plaintiff is not subject to the lien claimed by plaintiff; and that if it is, he (appellant) has a lien upon it superior to plaintiff's for a large amount, growing out of Ashby's failure to comply with his contract. He also asks judgment for same against the Spillmans as executors of their father.

Appellant bases his claim upon a written contract executed by him and George Denny to and with said Ashby, and accepted by and put to record by Ashby.

It seems from the record and briefs that Denny and Miller once owned the entire tract of land, and that upon some terms and conditions a life estate was sold to Ashby in one-half the land, and that Ashby became dissatisfied and another contract was made, which is in the following language:

"Whereas, John W. Miller and George Denny are the owners of a tract of land in Rockcastle county, Ky., about one mile east of Mt. Vernon; and, whereas, the said Miller and Denny did, on the 4th day of November, 1884, enter into an agreement, by contract written, with one S. K. Ashby, by the terms of which contract the said Ashby was to plant a portion of said tract of land in fruit trees, which has been done; and, whereas, the said Ashby is desirous of changing the contract, and enter into a new and different one as to terms and so on, which terms being agreeable to the aforesaid Miller and Denny, therefore, it is agreed by all the parties concerned to-wit, John W. Miller, George Denny, Sr., and S. K. Ashby, that the contract above referred to be set aside and held for naught, and the following be made binding in lieu thereof: Now, the premises considered, it is agreed for the consideration that the said Ashby binds himself, and agrees to, at his individual expense, properly care for and keep trimmed the orchard

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now growing upon the above-described boundary of land, and to replant same as a vacancy occurs by reason of the death of trees or otherwise, and to plant out another portion of the farm in fruit trees (apples and peaches), adapted to their growth, the said Ashby being allowed a reasonable time in which to do said work. Said Ashby is to keep up the fencing now upon the place, and make such other fences as is necessary to inclose the place and divide the same up properly, he having the right to use the timber upon the place suitable for such fencing. He also has the privilege of getting all the fuel from the place, either of wood or coal, necessary to run the fires of his own residence and any tenant house upon the place which may be occupied, but not to market any timber or suffer it to be wasted or destroyed.

"The said Ashby further agrees, at his individual expense, to gather all the fruit at the various and proper times and buildings or cellars upon the farm as shall hereafter be prepared to store same away; and the fruit to be divided, when marketed or manufactured, share and share alike—that is to say, that the said John W. Miller is to have one-third, George Denny one-third, and S. K. Ashby one-third. The said Ashby is to have the benefit of the crops grown upon said land other than the fruits, which are to be divided equally as above set forth.

"In consideration of the foregoing the said Miller and Denny do by these presents convey in fee simple to said S. K. Ashby, his heirs and assigns, one undivided one-third interest in and to the tract of land heretofore described, being the same bought by them from J. L. Joplin, as now of record in the clerk's office of the Rockcastle County Court, for which reference is made for the description of the boundary now specified. There is reserved in said conveyance, however, all that portion of said boundary of land lying north

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of the Knoxville Branch of the Louisville & Nashville Railroad, and supposed to contain some four or five acres, be the same more or less. This deed and contract is to remain in full force as long as the said Ashby, or any one for him, shall well and truly carry out the stipulations of the contract as above set forth, the said Ashby not to dispose of his interest herein conveyed to him to any person or persons without the consent in writing of the aforesaid Miller and Denny.

"Given under our hands this the 4th day of November, 1884. Signed:

"JOHN W. MILLER.

"GEORGE DENNY."

The foregoing deed was duly acknowledged and recorded in the county clerk's office. It is claimed that the contract referred to in the foregoing contract was dated in 1883, not 1884.

On the 15th of October, 1886, Ashby and wife conveyed the interest of Ashby in the said tract of land to Denny by general warranty. The expression in the deed is: "Have bargained, sold and conveyed, and do hereby convey, unto George Denny all of our interest in the farm upon which I now live, being owned equally by John W. Miller, George Denny and myself, said land lying in Rockcastle county, State of Kentucky, one mile east of Mt. Vernon, containing about 198 acres."

The deed shows the notes were executed for part of the purchase money. There is no claim that Ashby had the written consent of Miller to make the sale, but it is claimed that Miller acquiesced for a time in the sale, but the proof shows that Miller knew nothing of the sale until some time after it was made, and never did assent to it. The testimony conduces strongly to show that appellant has sus-

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tained great damage by the failure of Ashby to comply with his contract.

It is not pretended that Denny's vendees attempted to comply with the contract of Ashby, their contention being that they were not bound to do so. Ashby is a non-resident of this State, and made no defense.

It is in proof that Denny is insolvent, and has been since his conveyance of his two-thirds interest in the said land, which conveyance was made October 4, 1887. The consideration expressed is $5,000. The consideration expressed in the deed to Denny from Ashby for the one-third is $1,900, of which $1,000 was paid in a farm in Madison county.

Upon final hearing the court dismissed appellant's cross petition and rendered judgment in plaintiff's favor, and adjudged that plaintiff had a lien for the payment thereof on the one-third of the land, and adjudged a sale of the same. The one-third interest was appraised at $700, and purchased by plaintiff at $400. The questions presented for decision here are:

1. Could Ashby sell and pass a perfect title to one-third of the said tract of land?

2. Has appellant a lien on said third for the damages he sustained by the failure of Ashby to comply with the covenants of the bond or deed heretofore copied?

We think that Ashby could sell and pass title to Denny without the written consent of Miller, but the deed clearly shows that Ashby was to render certain service and perform certain work as consideration for the land, and if he failed to do so, and if appellant has been damaged thereby, he is entitled to recover, and is entitled to a lien on the one-third of the land sold to Ashby for the payment of the same, which lien is superior to that of plaintiff Fish. The proof

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as to damage is not sufficiently clear for this court to fix the amount.

The judgment of the court below is reversed and cause remanded, with directions to ascertain the damage sustained by Miller by reason of the failure of Ashby to comply with his contract, and to adjudge appellant a lien upon said land therefor (the issue as to damages to be submitted to a jury, if either party desires it), and for proceedings consistent with this opinion.

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CASE 14—PETITION ORDINARY—MARCH 26.

Kinney v. Louisville & Nashville Railroad Company.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. COMMON CARRIERS—LIABILITY FOR INSULT AND VIOLENCE TO PASSENGER.—Carriers are not the insurers of the absolute safety of their passengers or of their entire immunity from the misconduct of fellow-passengers or of strangers, but there is an implied obligation growing out of the contract between the carrier and the passenger, that the former shall afford to the latter reasonable protection and immunity from the insults, violence and wanton interference of intruders, fellow passengers and employes. And out of this obligation arises the rule that makes it the duty of carriers to exercise the highest practicable degree of care and diligence in protecting and guarding passengers from violence and assaults from whatever source, which may be reasonably anticipated or naturally expected to occur under the circumstances of the case and the condition of the parties.
2. SAME.—But in view of the facts and circumstances in this case those in charge of the train did all that the law required them to do for the protection of the appellant, and the evidence shows that the conductor acted wisely and discreetly in view of his responsibility and the circumstances of the case, and fully within the scope of his authority, and the peremptory instruction was, therefore, properly given.

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3. CONDUCTORS—AUTHORITY OF.—Conductors in this State are not clothed with the authority to act as peace officers, but the statute does prescribe a penalty against one who, while riding on a train, in the hearing or presence of other passengers, and to their annoyance, "uses or utters obscene language, or behaves in a boisterous or riotous manner," and makes it the duty of the conductor in charge of such train "either to put such person off the train or to give notice of such violation to some peace officer at the first stopping-place where any such officer may be."

J. A. SCOTT AND W. H. HOLT FOR APPELLANT.

1. The evidence as to the character of Estes' claim against appellant, that it originated from a gaming transaction while they were both in jail for fines, was incompetent, and only tended to prejudice the jury against appellant and divert their attention from the real issue.
2. It is the duty of a common carrier to protect its passengers from outrage, insult and injury at the hands of another passenger; and this, although the insulted or injured passenger may have been the debtor of the passenger offering the violence.

IRA JULIAN FOR APPELLEE.

1. While the law requires carriers of passengers to exercise reasonable care to preserve order and prevent assaults by one passenger upon another, with such force as they may have at hand, yet they are not the insurers of the personal safety of passengers against insults or assaults of a fellow passenger. And particularly should this qualification of the general rule apply where conductors have no police powers, and are not authorized to bear arms or make arrests. (Railroad v. Hinds, 53 Penn. St., 512; Cannon v. R. Co., 6 Ire., C. L., 199; Putnam v. R. Co., 55 N. Y., 108.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The action was to recover damages from the appellee for failing to protect the appellant, who was a passenger on one of its trains from the city of Louisville to the city of Frankfort, from abuse, violence and alleged robbery at the hands of one Jack Estes, a fellow passenger.

The lower court, on motion of counsel for appellee, at the

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conclusion of the testimony in behalf of appellant, instructed the jury to find for appellee, which was done, and the petition was accordingly dismissed. The only material question presented is whether, upon the facts in proof and the law applicable to such cases, this peremptory instruction, which was duly excepted to, was proper.

There were other exceptions taken by counsel for appellant to rulings of the court during the progress of the trial, in admitting and excluding testimony, which it is not necessary to notice because, in our view of the case, the rulings in these particulars were on immaterial points, and were not, in any event, prejudicial to the substantial rights of the appellant on the merits. We shall, therefore, confine ourselves to the questions presented in the exception of appellant to the instruction given by the court to the jury to find for the appellee.

The principles of law applicable to such cases as this are well settled by the almost uniform adjudications of the courts in this country. Carriers are not held to be the insurers of the absolute safety of their passengers or of their entire immunity from the misconduct of fellow passengers or of strangers; but there is an implied obligation growing out of the contract between the carrier and the passenger that the former shall afford to the latter reasonable protection and immunity from the insults, violence and wanton interference of intruders, fellow passengers and the carrier and his servants. (Winnegar's adm'r v. Central Passenger Ry. Co., 85 Ky. Rp. 553; Sherley, &c., v. Billings, 8 Bush, 147.)

Out of this obligation, and the doctrine that carriers of passengers are required to use the utmost care in the management of their trains in order to prevent or avoid injury to their passengers, arises the rule that makes it the duty of

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carriers to exercise the highest practicable degree of care and diligence in protecting and guarding their passengers from violence and assaults from whatever source, which may be reasonably anticipated or naturally expected to occur under the circumstances of the case and the condition of the parties; and if this duty is neglected or, without good cause, omitted by the carrier or his servant, the carrier will be held responsible for any injury to a passenger resulting from such neglect or omission, and which, but for same, might have reasonably been foreseen and prevented. These principles, it seems, are recognized and enforced by an almost unbroken line of decisions in this country. (Britton v. Atlanta & Charlotte Air Line Ry. Co., 88 N. C. Rep., 536; New Orleans R. Co. v. Burke, 53 Miss., 200; Pittsburg, &c., R. Co. v. Hinds, 53 Pa. St., 512, Pittsburg v. Pillow, 76 Pa. St., 510; Flint v. Norwich Transportation Co., 54 Conn., 554; Spohn v. Missouri Pacific R. Co., 26 Am. & Eng. R. Cases, 252; Thompson on Carriers, 303; Putnam v. Broadway, &c., R., 54 N. Y., 108; 14 Am. Rep., 190.)

And in the last-named case it is held, in harmony with the principles above stated, that a carrier is not responsible for the results of a sudden, unlooked for and violent attack committed by a passenger on a fellow passenger, although the assailant was intoxicated and had addressed insulting remarks to his fellow passenger, but remained quiet after being admonished by the conductor.

In this case the evidence brought up in the bill of exceptions shows substantially the following state of facts, viz.: The appellant and one Jack Estes were near neighbors and associates. They both boarded the train of appellee at Louisville, taking passage to Frankfort. They had both been drinking while in Louisville, and when they boarded the train Estes was very much under the influence of liquor,

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and he had a bottle of brandy with him, which served to keep him in a condition of intoxication during the trip to Frankfort. They entered different cars, but, after the train had gone some distance on the route to Frankfort, Estes, in his intoxicated condition, went into the car occupied by the appellant and took his seat near appellant, and soon commenced talking to him in a boisterous manner, claiming that appellant owed him a sum of money, and demanding it of him. After some time spent in this way appellant left the car to get out of the way of Estes, and entered the ladies' coach, and, taking his seat there, soon fell asleep. About the time the train reached Eminence or Pleasureville Estes entered the ladies' coach, where he found the appellant, and renewed his demand for the money he claimed appellant owed him, cursing and swearing at him, and saying he intended to have his money or his life.

It seems that the ladies in the coach were considerably disturbed by the loud and boisterous and threatening language of Estes, and the conductor, who came into the coach about the time or very soon after Estes entered it, remonstrated with Estes, who had his hands on the appellant, and told him to let appellant loose. Estes told him that appellant owed him money, and that he intended to have it or his life. The conductor ordered Estes to leave the ladies' coach and go into another car, and finally ordered both of them to go into another car, as he did not intend there should be any difficulty in the ladies' coach. It appears that appellant refused to go, and Estes swore he would not go unless appellant went, and when the conductor ordered them both to go appellant's testimony shows that Estes took him by the hair and pulled him out of his seat, and they then left the ladies' coach, together with the conductor.

After they entered the other car appellant went forward

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and took his seat with a stranger, and Estes remained back with the conductor, still cursing and threatening appellant, but the conductor finally pacified him, and he remained quiet until the train was near Frankfort, when Estes renewed the difficulty, and repeated his demands for the money he claimed appellant owed him. Meantime the conductor was standing near the appellant, and between him and Estes evidently trying to pacify the latter, when Estes, reaching around the conductor, said he would take the pistol of the conducter and shoot appellant if he did not pay him the money, but drew his own pistol and pointed it at appellant. The latter then threw his pocket-book, containing fifty-one dollars, into the lap of the stranger, by whom he was sitting, and asked him to count it and give it to Estes, which he did, but the money was soon after returned to appellant. Meantime it seems that the conductor was still between them, and while this latter scene was being enacted the train reached Frankfort, and the conductor forthwith called a policeman, who immediately entered the car and arrested Estes. What followed is immaterial, since the appellee or its servants had no further connection with the incident.

The bill of exceptions contains the following as part of the testimony of the appellant before the jury, viz.: "Estes and I had been drinking together off and on before we left Louisville. I live in the same neighborhood with Estes; have known him for years. We were good friends, and I knew his threats and conduct toward me all proceeded from whisky on the day of the trouble."

From the foregoing statement of the material facts of the case, fairly deduced from the evidence in the record before us, we feel constrained to say that, in our opinion, the appellee or its servants in charge of the train were not in

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fault, but that they did all that the law required them to do, in view of the circumstances of the case and the condition of the parties, for the protection of the appellant.

The conductor in charge had others under his care besides the appellant whom it was equally his duty to protect. The occupants of the ladies' coach, in which there was a difficulty pending between the appellant and Estes, were entitled to protection, and it was plainly the duty of the conductor to exclude the contending parties from the coach in order to secure the safety of the other passengers therein. Having done this, he succeeded in quieting Estes, who was still intoxicated, and who remained quiet and gave the appellant no more trouble until the train was near Frankfort; and then, when the difficulty was unexpectedly renewed by Estes, the conductor remained between him and the appellant until the train reached a point in the city where he could call in a policeman.

The conductor acted wisely and discreetly in view of his responsibility and of the circumstances of the case, and fully within the scope of the obligations devolved upon the carrier company, and upon himself as its servant, by the law as we have stated it and as found in the statute.

In this State conductors of railroad trains are not clothed with the authority to act as peace officers as they are in some jurisdictions; but the statute denounces a penalty against any person who, while riding on a passenger or other train, in the hearing or presence of other passengers, and to their annoyance, "uses or utters obscene language, or behaves in a boisterous or riotous manner," and *makes it the duty* of the conductor in charge of the train upon which there is a person who has violated the statute, "*either* to put such person off the train *or to give notice* of such violation to some peace officer at the first stopping place where any such

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officer may be." (Kentucky Statutes, section 806.)

We are of the opinion that the facts of this case, as developed in the testimony for the appellant under the law as stated and applied, would not have justified a verdict against the appellee, and that the peremptory instruction was properly given.

The judgment of the lower court is,therefore, affirmed.

CASE 15—WARRANT—MARCH 28.

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McTigue v. Commonwealth.

APPEAL FROM LOGAN CIRCUIT COURT.

1. TITLE OF ACT.—In a local prohibition law it is not necessary that the jurisdiction conferred upon justices of the peace therein should be expressed in the title to the act, because the provisions for the enforcement of the law in the tribunals designated, is not foreign to but is naturally embraced in the subject-matter suggested in the title.
2. JUSTICE OF THE PEACE—JURISDICTION—REPEAL OF LOCAL LAWS BY NEW CONSTITUTION AND STATUTES IN CONFORMITY THERETO.—The jurisdiction of justices of the peace must now be "equal and uniform throughout the State," as required by section 142 of the Constitution, and the general law enacted in conformity to that constitutional requirement operates as a repeal of special acts conferring jurisdiction, the exercise of which is inconsistent with the general law, even if the constitutional provision requiring such uniformity did not of itself effect such repeal.
3. Section 61 of the Constitution merely stipulates that nothing in the provisions of that section is to interfere with any law relating to the sale or gift of spirituous, vinous, or malt liquors, but does not restrict the effect that is to be given to other sections of the Constitution or the general laws enacted or to be enacted in conformity thereto.
4. All laws not consistent with the Constitution, which are not in terms repealed or made consistent therewith, will stand repealed

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without further legislation, at the expiration of six years from the adoption thereof.

S. R. CREWDSON AND CHAS. RHEA FOR APPELLANT.

1. An attempt in a local act to confer special jurisdiction on justices of the peace of a county is an entirely different subject from "an act to prohibit the sale of spirituous, vinous, or malt liquors in that county," and is, therefore, at variance with section 37 of the Constitution of 1850, which provides that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." (O'Donahue v. Akin, 2 Duv., 478; Hind v. Rice, 10 Bush, 528; Rushing v. Sebree, 12 Bush, 198; Jones v. Thompson, 394; Pennington v. Woolfolk, 79 Ky., 13.)
2. Section 142 of the present Constitution and section 1093 of the Kentucky Statutes, enacted in conformity thereto, providing for "equal and uniform jurisdiction" plainly operate as a repeal of all special laws conferring special jurisdiction on them in a particular locality. Section 61 of the Constitution is not inconsistent with this construction, as it merely means that nothing therein shall be considered as interfering with or repealing any law in force relating to the sale or gift of liquors; and does not mean to continue the special jurisdiction of justices of the peace to try such cases.

J. H. BOWDEN AND SAM BOOKER ON SAME SIDE.

1. The Constitution intended actual equality and uniformity, expressed by a fixed limit in amount, as to the jurisdiction of justices of the peace, and not a uniformity expressed by a mere word, with no fixed meaning.
2. The only effect of section 61 of the Constitution is to make it the duty of the General Assembly to pass a general local option law, and to declare that no existing law in force was thereby repealed; there is nothing therein inconsistent with the provisions of section 142, and the statute in conformity thereto, providing for equal and uniform jurisdiction of justices of the peace.

E. W. HINES ON SAME SIDE.

1. No legislation was required to carry into effect the provisions of section 142 of the Constitution, requiring the jurisdiction of justices of the peace to be "equal and uniform throughout the State," as there was a general law in force regulating their juris-

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diction, and the constitutional provision merely repealed the exceptions thereto, which were in local acts.

2. But if that be not true, the intention of the legislature in the enactment of section 1093 of the Kentucky Statutes was manifestly to repeal all such special jurisdictions in conformity to the mandate of section 142 of the Constitution.
3. The whole of section 61 of the Constitution considered together shows that it only means that so much of any existing law as prohibits the sale of liquors is not repealed thereby, leaving the jurisdiction in the trial of the same to be regulated by the general law.

CRADDOCK & SANDIDGE AND JOHN S. RHEA FOR APPELLEE.

1. No isolated section of the Constitution should be construed without reference to any other section, but the instrument should be considered and interpreted as a whole; and so considered it is perfectly manifest that it was the decided and fixed policy of the framers of that instrument to leave existing liquor laws untouched.
2. There is nothing in section 1093, of Kentucky Statutes, which undertakes to take away from justices of the peace any jurisdiction they may have then had. A statute can only be repealed by an express provision of a subsequent law, or by necessary implication; and a general statute without negative words will not be construed so as to repeal a previous statute which is special. (Com. v. Cain, 14 Bush, 533; Rounds v. Wayman, 81 Pa. St.; Thorp v. Adams, 6 Com. Pleas. Law Rep., 125; Nones v. Wellisch, 12 Bush, 364; McFarland v. State Bank, 4 Ark., 410; Com. v. Weller, 14 Bush, 218; Tyler v. E. & P. R. Co., 9 Bush, 514, 12 Bush, 233, 83 Ky., 658.)

W. S. TAYLOR ON SAME SIDE.

1. Section 142 of the Constitution relates only to the civil and penal jurisdiction given by general laws, and not to such as is given by special laws.
2. No general law repeals a special act, unless such an intention is clearly shown.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

By an act to prohibit the sale of spirituous, vinous or malt liquors in Logan county, adopted in March, 1886, and

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amended in April, 1890, it was provided that prosecutions thereunder might be by warrant issued by any justice of the peace in and for that county, or police judge of any town therein, or by indictment in the Logan Circuit Court.

The penalty for the first violation of this law was a fine of not less than fifty dollars nor more than two hundred dollars, and for subsequent infractions thereof a fine of not less than one hundred dollars nor more than three hundred dollars, and confinement in the county jail not less than thirty nor more than ninety days. The appellant was convicted of selling malt liquors in violation of this law, under a warrant issued by and trial had before a justice of the peace, and fined one hundred dollars. On appeal to the circuit court he moved to dismiss the prosecution because the justice had no jurisdiction to try him. His motion was overruled, and from the judgment rendered against him, after trial in that court on the justice's warrant, he has appealed.

It is not contended by his counsel that the special law conferring the jurisdiction was in contravention of any law in existence, when the act was passed. Except the provision in the body of the act conferring jurisdiction on justices of the peace, it is suggested, is not expressed in the title, and this position is wholly untenable The provision for the enforcement of the law in the tribunals designated is not foreign to but is naturally embraced in the subject-matter suggested in the title.

It is admitted that there was no inhibition against such special legislation in the former Constitution, and that even the general law limiting the jurisdiction of justices to cases where the penalty could not exceed twenty dollars, contained the proviso "unless the jurisdiction thereof is specially conferred." (Section 2, article 20, chapter 28, General Statutes.)

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The contention is, however, that the jurisdiction of justices must now be "equal and uniform throughout the State" (section 142, Constitution), and that the general law enacted in conformity to that constitutional requirement operates as a repeal of special acts conferring jurisdiction, the exercise of which is inconsistent with the general law And such is our opinion.

Section 142 of the Constitution, so far as it relates to this question, reads as follows: "The jurisdiction of justices of the peace shall be co-extensive with the county, and shall be equal and uniform throughout the State."

The general law on the subject, now section 1093, Kentucky Statutes (act of June 10, 1893), provides that "justices shall have jurisdiction, exclusive of circuit courts, in all penal cases, the punishment of which is limited to a fine not exceeding twenty dollars, and jurisdiction concurrent with circuit courts of all penal cases, the punishment of which is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, or both."

If, therefore, effect be given the plain letter of the Constitution and the statute in conformity thereto, the jurisdiction of the courts in question must be found, and found only, in the general law on the subject.

It may not be that the constitutional provision requiring uniformity of jurisdiction did of itself effect a repeal of the various acts conferring these special and irregular jurisdictional powers, but certainly when the legislature came to revise and amend the statutory laws on the subject-matter now involved, to the end that they should "conform to and effectuate the Constitution," as was enjoined in section 245 of that instrument, there can be no doubt of the effect of such revision and amendment on all laws inconsistent therewith.

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Laws conferring jurisdiction—not equal and uniform—on justices of the peace are certainly not consistent with the demands of the Constitution, and at most can remain in force only until legislation expressly prescribing uniformity and equality shall be enacted. Here such a statute has been enacted, and it was impossible to have made the jurisdiction in question "equal and uniform throughout the State," and at the same time retain on the statute books the special and varying laws on the subject.

If some of these special prohibitory laws confer exclusive jurisdiction on justices of the peace the result will not be, as feared by the attorney for the State, that offenders will go untried, but rather it would seem that the courts of general jurisdiction created by the very act which withdraws jurisdiction from the special tribunal may be found sufficient to afford the remedy.

It is said, however, that section 61 of the Constitution expressly continues in force the prohibitory laws then in existence. That section provides as follows: "The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated; but nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days."

Here, it will be seen, is found nothing more than a provision against a possible misconstruction of the intent of the framers of the Constitution in directing a general law to be enacted by a succeeding legislature. Strictly speaking, no law is here continued in force; but, so far as this section—

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this provision that the General Assembly shall hereafter provide a general law—is concerned, it shall not of itself operate to repeal the special laws on the subject of the sale of spirituous, vinous and malt liquors.

Infused with the hope that for all special laws general ones were to be substituted under the better system about to be provided, the framers of the Constitution yet did not intend at once to interfere with the various prohibitory enactments throughout the State by the bare adoption of a section demanding the enactment of a general law.

But that such general law was to take the place of all special ones we can not doubt. Each designated locality, under the requirements of this section, was to be given the right of regulating the traffic in question under a consistent and uniform law. If the sale was prohibited it was to be because of this law, and no other; and penalties for selling were to be imposed in virtue of its provisions, and no other. They would, therefore, be uniform throughout the State.

Within the spirit of the Constitution, if not within its very letter, the law must inflict like penalties for like offenses; and surely there must come a time when the penalty for selling liquor in one locality may not be by a small fine only, and in another the same offense be punished by a fine of hundreds of dollars, and an imprisonment of many months in the county jail.

We may well denounce as a delusion the crowning boast of the Constitution—that systematic uniformity in the administration of the laws has been provided for with approximate perfection—if these monuments of local inconsistencies shall continue to mar the symmetry of our statutes.

While the general law, known as the local option law, seems to come short of effecting the intention of the framers of the organic law on the subject of uniformity, in that in

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localities where the vote is against the sale, the penalties theretofore denounced by special prohibitory laws are still to be inflicted, yet we may note that even without further legislation all laws non-consistent with the Constitution, and we believe not consistent with its spirit, which are not in terms repealed or made consistent in the meantime, stand repealed at the expiration of six years after the adoption of the Constitution.

However, the effect of the adoption of the general law providing for taking the sense of the people on the subject indicated need not now be determined. The question was not raised in the court below, and is not discussed by counsel here.

It is sufficient to say, for the purposes of this case, that section 61, prescribing its own construction or providing against its misconstruction, and declaring that it, of itself, is not to interfere with any law relating to the sale or gift of such liquors, does not determine what effect is to be given other sections of the Constitution, or other general laws enacted or to be enacted by the General Assembly; and certainly does not keep alive extraordinary features of special laws conferring unusual jurisdiction on inferior tribunals in violation of the plain letter of the Constitution, and the general laws providing for the required uniformity.

General laws may not affect the repeal of special ones under the circumstances considered in Commonwealth v. Cain, 14 Bush, 533, and other cases relied on by the appellee, because "both laws may be upheld and construed as forming one consistent whole;" but it would be a strikingly "inconsistent whole" if the equal and uniform jurisdiction of justices of the peace demanded by the organic law is to be unequal and varying in all the magisterial precincts affected by these very numerous local acts.

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This construction in nowise impairs the efficiency of the law, for, as we have seen, the courts of general jurisdiction may afford whatever relief the State shows herself entitled to.

Reversed, with directions to dismiss the prosecution.

CASE 16—PETITION ORDINARY—MARCH 31.

City of Louisville v. Bannon.

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APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. CLOSING ALLEY—PUBLIC USE.—It being manifest that the object of this proceeding upon the part of the city was to close the alley and allow the land therein to revert to the abutting property owner for a money consideration, the court below properly refused to close it, as a mere money consideration to be paid to the State or municipal government, is not a public use for which private property can be taken from one citizen and given to another.
2. The grant of the power to vacate and close public ways can not be drawn by implication from section 2826 of the Kentucky Statutes which provides that no public way shall be opened, narrowed, closed or constructed except by ordinance recommended by the Board of Public Works, as that provision is purely prohibitory in its nature. Nor can such a power be safely held to be included in the grant in Section 1 of the act for the government of cities of the first class of "power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act, nor the constitution and laws of this State."

T. L. BURNETT, SIMRALL, BODLEY & DOOLAN, LANE & BURNETT & H. S. BARKER FOR APPELLANT.

1. The legislature has the power to discontinue or vacate any street or public way in a town or city, or to authorize the municipal authorities to do so, with the limitation that the owners of property abutting must receive compensation for the damages resulting to them in the destruction of their individual easements. (Bradbury v. Walton, 94 Ky., 163; Turnpike v. Dve, 18 B. M., 761; Dillon on Municipal Corporations, 3d Ed., section 666.)

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2. The necessity for closing this alley is a question to be determined by the legislative department, and is not a question for the courts. (Sedgwick on Construction of Statutory and Constitutional Law, in note on page 444-45; 18 Cal., 229; 14 Wis., 609; 21 N. Y., 597; 11 Wend., 149; 25 Iowa, 540; 32 Pa. St., 169; 25 Mo., 515 and 540; 17 N. H., 47; 39 N. Y., 174; 23 Cal., 323; 3 C. E. Green, 54; 47 Maine, 189; 103 Mass., 120; 51 Barb., 27; 1 Wash. T., 128.)
3. When the officers of a municipal corporation are invested with legislative powers, their authority and motives in reference thereto will not be inquired into. (Dillon on Municipal Corporations, 3d Ed., sec. 313; Endlich on Interpretation of Statutes, sec. 31; Sunderland on Stat. Con., sec. 330; Johnson v. Higgins, 3 Met., 576.)

PHELPS & THUM FOR APPELLEES.

No brief in the record.

JUDGE DuRELLE DELIVERED THE OPINION OF THE COURT.

This was a suit in the name of the city of Louisville to close a 40-foot alley, known as Cotton street, running east and west, extending from Thirteenth to Fourteenth street, between and parallel with Lexington and Maple streets. North of and parallel with Cotton street, in the same square, is a 20-foot alley, extending from Thirteenth to Fourteenth street, and connected with Cotton street by a 20-foot alley, running north and south, the last-named alley being the same one, the obstruction to the south end of which was enjoined, in the case of Bannon v. Rohmeiser, 90 Ky., 48.

Bannon, who is one of the defendants in the action, is the owner of all the land on both sides of Cotton street, except a lot fronting sixty feet on that street at its intersection with Thirteenth, owned by Bloomer. The other defendants are the owners of all the lots abutting on the two 20-foot alleys, which, with Cotton street, form the system of alleys of that city square.

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The petition states facts showing the dedication of the alleys named as public ways, and alleges that the 40-foot alley (Cotton street) is on marshy soil, lower than the grade of the streets, and, owing to the impracticability of using it as a public way, has never been improved by the city; that the city has extended a line of curbing along Thirteenth street, across the end of it, and thereby preventing ingress and egress to and from that end; that the occupation of Fourteenth street by railroad tracks has practically closed the west end of Cotton street; that the closing of the alley is a public necessity and will be a public benefit, would benefit the city of Louisville and injure none of the owners of property on the square; that if it is kept open it will be the duty of the city to improve it, and the improvement will be a needless expense to the owners of lots on the square.

The petition also avers that the board of public works recommended, and the general council passed, an ordinance instructing the city attorney to institute an action in the Jefferson Circuit Court against all persons owning lots abutting on said 40-foot public way, and all persons interested therein, to close said strip as a public way.

The prayer of the petition is that the alley be closed, and for a judicial determination that its closing will be a benefit to the city of Louisville, and will work no injury to the owner of any lot on the square; and, further, that if, in the opinion of the court, any of the private easements of the defendants be of any value, the value be ascertained and the defendants compensated therefor.

Bannon and some other of the defendants filed answers admitting that the closing of the alley would be a benefit to the city, and no injury to the defendants, but other defend-

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ants have filed answers denying the averments of the petition and alleging that the 40-foot alley is connected with, and is a necessary outlet to, the 20-foot alley, and that they are public ways, to the use of which the defendants are entitled.

These defendants plead that the passage of the ordinance under which this suit was instituted was procured by fraud, for the private purpose of benefitting the defendant, Bannon, and for no public use or benefit; that the ordinance is a mere proposition to sell the 40-foot alley to Bannon; that the closing of the alley will injure their lots and destroy the easements over both alleys, and is not authorized by law.

It is shown by the answers that a previous suit (No. 43506) was brought in 1890 by Bannon to declare the alley closed, and that by resolution of the general council the appearance of the city was authorized to be entered and judgment confessed as against it; that this was done, but that afterwards, for some undisclosed reason, the city filed an answer in that suit, denying the averments of Bannon's petition, averring that the closing of the alley would be injurious to the lot owners and of no benefit to the city, and that Bannon's petition in that cause was accordingly dismissed. The judgment in that case is pleaded as a bar. It is also pleaded that the city is estopped by its answer in that cause.

The ordinance, under authority of which this suit was instituted, has the following preamble: "That, whereas, Patrick Bannon has, by written proposition, proposed to pay to the city of Louisville two thousand dollars for a strip of land (describing the 40-foot alley); and whereas, it is deemed by the general council that said way should be discontinued as a public way. * * *"

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It is perfectly evident from the pleadings and evidence in this suit that, while brought in the name of the city of Louisville, the real issue is between the defendant, Bannon, on the one side, and the defendants, who are resisting the closing of the 40-foot alley, on the other. The question for decision is whether an alley, which is a public way in the city of Louisville, can be closed against the will of the persons owning lots in the square through which the public way extends, and who have an easement over it.

This suit was brought in conformity with the provisions of the city charter as it existed prior to the adoption of the act for the government of cities of the first class. It is claimed, however, on behalf of the city that it is authorized by section 64 of the act of July 1, 1893, for the government of cities of the first-class (Kentucky Statutes, section 2826), which provides that "no public way shall be opened, narrowed, closed or constructed * * * except by ordinance recommended by the board of public works."

It is claimed in the brief for the city that two thousand dollars referred to in the ordinance was in the nature of a guaranty to the city, wherewith to pay the damages the property holders would suffer by the closing of the alley.

The evidence of real estate agents taken in the case is quite conclusive that damage would ensue to the lot-holders from the closing of the alley, though it is contended that this damage would be offset by the cost of construction of the alley, which would be assessed against the owner.

It is unnecessary to go into the question of fraud in the passage of the ordinance, of the estoppel pleaded against the city, or of the public necessity for the closing of the alley. No evidence is produced of any need that the city has for the land embraced by the alley, or of any public use to which it

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could be put. The intent of the ordinance and the proceeding based upon it was to allow the land to revert to Bannon as the owner of the abutting property in consideration of two thousand dollars. A mere money consideration, to be paid to the government, State or municipal, is not a public use for which private property can be taken from one citizen and given to another. Nor is it pretended that this is a condemnation proceeding, or that the land embraced in this alley is needed for any municipal use.

This court does not undertake to decide in this case that the State legislature can not provide for the closing of streets and alleys in a municipality, or delegate that power to the municipal government. But whatever power the city has to close streets and alleys must be delegated by the State. If, therefore, the charter amendment under which the proceeding was instituted in Martin v. The City, 16 Ky. Law Rep., 786, was not repealed by the act for the government of cities of the first class, then, as held in that case, the mode there provided is exclusive. If that provision is repealed by the act of July 1, 1893, then there is no legislative grant to the city of power to vacate and close public ways. Such a grant can not be drawn by implication from section 2826, Kentucky Statutes, providing that no public way shall be opened, narrowed, closed or constructed, except by ordinance recommended by the board of public works, for that provision is purely prohibitory in its nature. Nor can such a power be safely held to be included in the grant in section 1 of the act for the government of cities of the first class of "power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act nor the Constitution and laws of

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this State." As is said by this court in the Martin case, before referred to, "Without some legislative authority the city has no power either to condemn or close streets or alleys." * * *

Judgment affirmed.

CASE 17—PETITION EQUITY—APRIL 1.

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Lafferty, &c v. Huffman, &c.

APPEAL FROM HARRISON CIRCUIT COURT.

1. CONSTITUTIONAL LAW—ENROLLED BILL CAN NOT BE IMPEACHED BY JOURNALS.—An enrolled bill, when attested by the presiding officers of the two Houses of the General Assembly, as required by law, can not be impeached by the journals of those Houses, and must be accepted by the courts as the bill adopted by the legislature and as conclusive of the regularity of the steps taken in its passage.

To do otherwise, would be for the courts to scrutinize the manner in which the legislative department may have performed the details of its work, or to arrogate to themselves a supervisory power wholly inconsistent with the fundamental truth that the departments of government are equal and independent in their respective spheres.

2. LOCAL OPTION—RIGHT OF TOWN OF SIXTH CLASS TO TAKE VOTE.—It is plain both from the general local option law and the act for the government of towns of the sixth class, that a separate vote on the question whether liquor shall be sold in the town may be had in the town, although it may have formed a part of a magisterial precinct in which a special prohibitory law was in force at the time the present local option law went into effect. It is not necessary that the vote be taken in the whole magisterial precinct. (Distinguished from King v. Com., 86 Ky., 436.)

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3. OFFICERS—RIGHT OF TOWN TRUSTEES TO HOLD OVER.—Where there was no election in November, 1893, in a town of the sixth class for town trustees, the old trustees held over under the express provisions of section 167 of the Constitution until their successors are elected and qualified.

J. Q. WARD FOR APPELLANTS.

1. The Constitution having authorized such an election as was held, and the General Assembly having passed a general law as directed by the Constitution, and the people having attended the election and voted, and the same having conformed to the law in all respects, the validity of the statute should be sustained. (Hall v. Commonwealth, 15 Law Rep., 104.)
2. Where no trustees were elected in towns of the sixth class in November, 1893, the old trustees hold until their successors are elected and qualified. (Sec. 167 of the Constitution), and their acts are validated by the Acts of 1894, being sec. 3672, Ky. Statutes.)
3. All local option laws in this State in force at the time of the adoption of the present Constitution were so changed by the Constitution and the laws enacted in conformity thereto, that they can be repealed, changed or annulled by a vote taken in a county, district or town as provided by the Constitution and laws.

BLANTON & BERRY FOR APPELLEES.

1. The terms of the trustees of the town of Berry, elected in April, 1893, no election having been held in November, 1893, as required by the Constitution and by the charter of towns of the sixth class, expired in November, 1893, and the failure to then elect trustees created a vacancy in the entire board, which could only be filled by appointment by the county judge, as provided in amendment to charter. Chapter 81 Acts, 1894, page 187. Persons claiming to be trustees, without being elected or appointed, may be enjoined from executing or proceeding under an unconstitutional law. (Spelling Extraordinary Relief, section 633.)
2. A bill did not have the yea and nay vote called and entered upon the journal, when put upon its final passage, has not been constitutionally passed or enacted, and is invalid. (Section 46 of constitution is mandatory.

Therefore, the act known as the Local Option Law, being chapter 89 of Acts 1891, 1892, 1893, not having been enacted as

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required by section 46 of Constitution, is unconstitutional and invalid. (Norman, Auditor, v. Board of Managers, 93 Ky., 537.)

3. Even if constitutionally enacted, neither that Local Option Law nor the Charter of Towns of the Sixth Class, either expressly or by necessary implication, repeals any of the provisions of a special act, approved March 6, 1884, entitled: "An Act to regulate the sale of spirituous, vinous and malt liquors in the Berryville precinct in Harrison county."

Said act having become operative by a vote of the precinct remains in force in the town of Berry, until expressly repealed, and an election held in the town of Berry (which is a part of the precinct) submitting the proposition of "sale or no sale" is illegal and void, as the law must be repealed by the same authority which enacted it.

4. Mandamus and injunction are the proper remedies to prevent an officer from doing an illegal act "under color and claim of official authority which tends to impair public rights, or will result in irreparable or serious injury to private citizens, or when preventive relief is necessary to prevent a multiplicity of suits." (Spelling Extraordinary Relief, Section 609.)

5. A general law or statute, without negative words, does not repeal a previous special or local law, though the provisions of the two may differ. (Commonwealth v. Cain & Weller, 14 Bush., 213 and 532.) But a general law is repealed by a subsequent local law, when the former is inconsistent with the latter. (Haynes v. Commonwealth, 94 Ky., 237.)

6. The answer does not deny or meet the allegations of the petition, and is bad on demurrer; the petition being taken for true, the court did not err in granting the relief sought.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Pursuant to the provisions of what is known as the "local option" law of August 4, 1892, a vote in the town of Berry, in Harrison county, was taken on January 31, 1894, and resulted in favor of the sale of spirituous, vinous and malt liquors.

When the county judge was about to direct the certificate of the election officers to be entered of record, and the trustees of the town were accordingly about to grant licenses, the appellees, certain citizens of the town, instituted this

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suit to prevent such action on the part of these officials.

The chief point relied on in the petition for injunction is that the law under which the election was held was not enacted by the General Assembly in the manner required by the Constitution; the allegation on that behalf being, in effect, that, on the final passage in the Senate of the bill, as amended in the other House, the vote was not taken by yeas and nays and entered in the journal as required by section 46 of the Constitution.

A consideration of other points relied on will be deferred until after disposition of the principal question.

It is conceded that the bill, properly enrolled, was signed by the presiding officer of each of the two Houses, and signed and approved by the governor.

The question is, can a law thus promulgated be impeached by reference to the journals of either House?

Different answers have been given to this inquiry in various courts of last resort in this country, but in this State it remains substantially unanswered; for whatever may be said of the argument of the question in the World's Fair Case (Norman, auditor v. The Kentucky Board, &c., 93 Ky., 537), we are not to take the case as decisive of that which it expressly disclaims to decide. After a discussion tending, it may be admitted, to the conclusion that such an impeachment might be had, the majority opinion yet determines it to be unnecessary to decide the question, and the plaintiffs seeking to recover under a law sought to be so impeached were there denied relief on grounds not pertinent to this inquiry.

It is to be observed, at the outset, that this is not a case where the enrolled bill is supposed to be in anywise different

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from the bill actually adopted by the legislative body.

It is not a dispute over contents. Such a question is presented in many of the cases. Thus in Field v. Clark, 143 U. S., 649 (1891), the allegation was that a section of the bill, as it actually passed, was not in the enrolled bill as authenticated by the signatures of the presiding officers, and deposited with the Secretary of State. And so in State v. Town Council of Chester, 39 S. C., 307 (1893), the contention was that the original bill, which was sent from the Senate to the other House, was altered by the Speaker of the House of Representatives at the time or after it passed that House, and amended as he saw fit, when the journals of the House showed no such alterations.

These cases, and we note them here as samples of many others to the same effect, hold that the official attestation of the presiding officers of the legislative bodies and of the executive are conclusive that an act so authenticated is the very act passed by the body, and leave undetermined, in express terms at least, the further question whether an act may be impeached if the journals fail to show that which the Constitution expressly requires them to show; such as that the bill was passed by a yea and nay vote.

An examination of these cases, however, shows that the argument against the use of the journals to show that the bill was not the same as that actually adopted is quite conclusive against their use to show the absence of the steps contemplated by the organic law.

And we may observe in this connection, it would be strange if it were otherwise; for why should the journals, if deemed capable of shedding light on any question touching the bill, be rejected as evidence affecting the substance (the

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very bill itself) and held competent to effect the mere steps in the process of passing it?

Indeed, does there not seem to be stronger reasons for seizing hold of the journals to expose the fraud of promulgating as valid a law which had in fact never passed at all, than for using them to undermine a law because of flaws in the steps taken during its passage?

Manifestly, therefore, the case of Field v. Clark, and the numerous decisions of the State courts, which have gone to the extent, and no further, because the particular case did not demand it, of holding the journals incompetent to declare the enrolled bill not to be the very one adopted by the legislative body, must be classed with a few exceptions, along with the authorities holding that the verity of the enrolled bill, when duly certified and authenticated by the presiding officers, is absolute and conclusive.

So construing these cases, it becomes palpable that the overwhelming weight of authority is against the impeachment of the enrolled bill by the journals whether in a matter affecting the contents of the bill, or merely the regularity of the steps taken in its passage.

When we look to the argument, much may be said on either side of the question, and we shall content ourselves with suggesting only a few of the controlling reasons for our opinion.

In the first place, no court can begin its scrutiny of the manner in which the legislative department may have performed the details of its work, as shown by its daily journals, without a sense of assumed superiority, or without seeming to arrogate to itself a supervisory power wholly inconsistent with the fundamental truth that the departments

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are equal and independent in their respective spheres. Surely must the passing of bills, and all the accompanying minutia, be exclusively legislative processes. Courts do not make laws or pass bills; and the various steps required by the organic law taken seem, in the nature of things, to call for the exercise of legislative and not judicial functions.

The judiciary, at every step of its investigation into the journals of a legislative body, must find itself confronted with the embarrassing question, how is it that the courts have come to be the exclusive guardians of those mandatory provisions of the Constitution which direct the legislature only how to transact its business?

The answer must be more embarrassing because such a thing can not be except on the assumption that the courts must regard themselves as alone competent for such oversight.

It is to be admitted that unless the constitutional mandate is followed "no bill can become a law." The Constitution so says. But the question remains, what shall be taken by the courts as the basis of judicial knowledge? Must they look to the journals and accept as conclusive the hasty memoranda of the clerk or his assistant, or shall they assume that the legislature obeyed the Constitution and accept as conclusive the certifications of its presiding officers?

That the act or successive acts of some agency somewhere or somehow must be held conclusive is entirely evident, unless we open the doors to all competent proof, including that of the member on the floor, an absurdity not to be thought of. The result is we must accept as conclusive either the entries of the clerk in the journals or the more deliberate acts of the presiding officers.

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It must be conceded on all sides that at least some of the directions of the Constitution prescribing steps to be taken in the passage of a bill are addressed primarily if not exclusively to the legislature. Thus no bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members. Every bill shall be read at length on three different days in each House. (Section 46.) And so before the presiding officer of each House shall have affixed his signature to any bill he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become a law. The bill shall then be read at length and compared, and if correctly enrolled the presiding officer, in the presence of the House in open session, and before any other business is entertained, affix his signature, which fact shall be noted in the journal, and the bill immediately sent to the other House. When it reaches the other House the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceedings shall thereupon be observed in every respect as in the House in which it was first signed, and thereupon the clerk of the latter House shall immediately present the same to the governor for his signature and approval. (Section 56.)

Can it be said that a statute has not become a law if the journals show it was not reported by a committee or printed for the use of the members, or read at length on three different days, or was signed by the presiding officer without a suspension of all other business, and when no entry appears in the journals noting such signature? At least some of these steps are especially required to be entered in the journal, and nearly all of them ought to appear there if the

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Houses keep a journal of their proceedings, as required by section 40 of the Constitution.

In some of the courts, where the journals are held to be competent evidence to impeach the enrolled bill, it is said that where those records are merely silent the presumption is absolute that the required steps were in fact taken. This seems to us hardly logical. If the validity of a law is to rest at all on the entries in the journals, it seems to us when there is a total absence of evidence that a necessary step has been taken, the superstructure—the law—thus built up without a foundation must fall.

Those courts assume that the failure of the clerk to make the entry and in this violate the Constitution requiring the entry to be made was an oversight or mistake, and treat the entry as made, supplying the omission, and yet are not willing to assume it to be a mistake or mere misapprehension of the inferior officer, if an entry is made, showing steps taken not in conformity with the constitutional requirements.

Even if resort is had to the journals it would seem as consistent to overlook the sins of commission by the clerk and treat his entry showing a violation of the Constitution as not true as to overlook his sins of omission and supply the defects in his record. To avoid the necessity of resorting to these fine-spun distinctions we are convinced that the consistent and safe rule is to assume that the legislature, in obedience to the Constitution, has taken the steps required by that instrument in the passage of every law, attested by the signatures of its presiding officers, the journals to the contrary notwithstanding.

The enrolled bill, so attested and signed and approved by the Executive, is easy of access and inspection, but what shall we say of the journals? At the session at which the

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law now under consideration was adopted those records consist of over 4,000 pages. They seem to have been hurriedly and imperfectly indexed, as in the nature of things they must ever be. The assiduous lawyer who plods through these volumes may fail to find the evidence of an important step required by the Constitution to support a statute which has been promulgated as the law of the land, and the court in this case declares as a matter of fact that the *prima facie* law so promulgated is not, in fact, the law. In an adjoining circuit the court is more fortunate, and the missing step is found, or the erroneous entry is found corrected elsewhere in the record. So the law is upheld, and this confusing result will be reached, not because the law depends on the testimony or the pleadings in any given case, for the courts must take judicial notice of the journals, if they are controlling, as well as of the signatures of the presiding officers, if these are to be held conclusive; but the confusion comes from the nature of the record to be inspected. This is usually prepared by the subordinate officers hurriedly, amidst the excitement and confusion incident to legislative bodies, and with small concern for those details which are to become so important if the record is to be subjected to judicial scrutiny.

But it is said, since the Constitution requires the journals to be kept, it must be because they are to be used as evidence of legislative compliance or noncompliance with the constitutional requirements. We can see, however, much use for these journals other than the one suggested. Besides being necessary for the conduct of the business, it is to be remembered that our government is a representative one, and the journals show the respective parts borne by each representative in the enactment of the laws and the conduct of the

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public business. Responsibility can not be shifted or made to rest on the body as a whole. We know that the enrollment of bills receives careful attention at the hands of special committees for that purpose. It is the final act of the body, the climax of the work before the finishing hand of the presiding officer sets his approval thereto. It receives and merits attention for that reason, and there is small room for imposition or fraud. The enrolled act is well nigh necessarily the very act passed by the body, but the chances of mistake are very great in the make-up of the journals, as they are ordinarily kept, and if it be understood that the enrolled bill may be impeached by them the chances of fraud are likewise great. They are usually read from loose sheets or hurriedly made memoranda, and are approved with slight attention, are then passed to the journal clerk or some copyist, to be transcribed formally in the journal. They receive usually no further consideration at the hands of the body.

In after years the careless omission of a name on the affirmative side of a law, requiring a certain number of votes is made the basis of a judicial finding that the law has not been enacted by a constitutional majority.

This feature is well put in the recent case of State *ex rel* Reed v. Jones Co., 6 Washington, 468 (1893), where it is said: "Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist employed by the legislature at a few dollars a day."

The same point is thus stated by Justice Harlan in Field

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v. Clark: "The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of the State, attested by the signatures of the presiding officers of the two Houses of Congress and the approval of the President, is conclusive evidence that it was passed by Congress, according to the form of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them."

It is said, however, that such a conclusion results in leaving the legislative department free to nullify the plain provisions of the Constitution, and refuse to comply with the formalities required by that instrument in the enactment of the laws. If this is true it does not follow that the courts may interfere with the processes of the legislature in that respect. If that department fails or refuses to do the bidding of the Constitution it is responsible to the people and not to the courts. Besides, an assumption that it will so fail or refuse is not to be made the basis of judicial action. To the argument that if the authenticated roll is conclusive upon the courts, then less than a quorum of each House may, by the aid of corrupt presiding officers, impose laws upon the State in defiance of the inhibition of the Constitution, the Supreme Court of Indiana, in Evans v. Brown, 30 Ind., 514, responded thus: "It must be admitted that the consequence stated would be possible. Public authority and political power must of necessity be confided to officers, who, being human, may violate the trusts reposed in them. This, perhaps, can not be avoided absolutely, but it applies also to all human agencies. It is not fit that the judiciary

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should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments, and correct or prevent abuses of their authority. It can not authenticate a statute. That power does not belong to it, nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. Nor is there any great force in the argument which seems to be regarded as of weight by some American courts that some important provision of the Constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the Constitution, or else it assumes that they will wilfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligation."

From every point of reason, therefore, we are convinced that the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the legislature, and that its mode of enactment was in conformity to all constitutional requirements. When so authenticated it imports absolute verity and is unimpeachable by the journals.

When we look to the authorities we find, as indicated before, a great diversity of opinion. They are too numerous to be reviewed here. We notice, however, that the more recent cases are adopting the English rule, and holding the enrolled bill conclusive. In several of the cases where the courts felt constrained to follow their former rulings, hold-

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ing the journals competent, regret is expressed that a different rule had not prevailed. (State v. Moore, 37 Neb., 13.) Others express a doubt whether it is the better rule, and in South Carolina the court overrules its former decisions and adopts the views expressed in Field v. Clark. (State v. Town Council of Chester, 39 S. C., 307.)

In the recent case of Carr v. Coke, 116, N. C., 223 (1895), the question was considered as one of new impression in that State, and, after what seems to us a very satisfactory course of reasoning and a review of the principal authorities, the conclusion was reached that "when the legislature has solemnly certified to a fact, that is to the passage and ratification of an act which is within its own sphere," the judiciary will not be permitted "to inquire into or dispute that certification."

To the same effect is the case of Hardee v. Wentworth, 42 Pacific Rep., 1028 (Arizona, 189). The opinion in this case is well considered, and the doctrine restated on principle and authority. See also the recent cases of Lyons v. Woods, 153 U. S., 649; State v. Nye, 42 Pacific Rep., 856 (Nev.); Hunt v. Wright, 70 Miss., 298; Hollingsworth v. Thompson, 12 Southern Rep., 4; 45 L. A., 222; State v. Boyce, 40 N. E. R., 113 (Ind.), and Western Union Telegraph Co. v. Taggart, 40 N. E. R., 1051.

The older authorities are found collected in the notes to Field v. Clark, and the Washington & North Carolina cases cited, and need not be further discussed.

Regarding, therefore, the act of August, 1892, as constitutionally enacted, it is yet insisted by the appellees that as prior to January 31, 1894, when the vote in the town of Berry was taken, a special prohibitory law (1884) was in force in the magisterial precinct that included the town; therefore,

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no vote in the town alone could undo the vote of the entire precinct, and that the same subdivision which voted out the sale must act to vote it in.

The case of King, &c., v. Commonwealth, 86 Ky., 436, is relied on to support this contention. But in that case the right claimed by the town to take a separate vote was confessedly derived from the same law which conferred a similar right on the precinct which included the town. The power given each subdivision was from the same source, and was simultaneously conferred. Hence the conclusion was reached that no greater but equal power was conferred on each, and when the whole acted under the general law the part could not undo what it had done. But here we have a new political division created and new powers conferred. A complete separate entity is erected by a new charter of the town of Berry, and the trustees thereof given exclusive control of the question at hand except they can not grant license when forbidden by a previous law until the law is changed. And as showing that such a change might be had and how, we have only to quote a provision of the charter on that subject, adopted in July, 1893, to-wit: "That in any town of the sixth class, in which the question as to whether spirituous, vinous and malt liquors might or should be sold shall hereafter be submitted to the voters thereof, and the majority of votes cast thereat shall be in favor of the sale of such liquors therein, then the said board of trustees of such town shall have no right, power, privilege or discretion to refuse to grant licenses to sell such liquors therein, until another election is held therein, as provided by general laws, and a majority of the voters of said town have voted against the sale of such liquors." (Subsection 4, section 3704, Kentucky Statutes.)

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A vote in the new territory was, therefore, clearly contemplated and authorized by this charter, and, moreover, the general law—the local option law—was adopted to the end that consistent and uniform laws should prevail everywhere in place of these various and irregular special acts. Such was our conclusion in the recent case of McTigue v. Commonwealth.

Of course the same precinct in which the vote was originally taken can never have another vote taken. It is well known that both the magisterial and voting precincts of 1884 have long since been obliterated and new ones erected (Kentucky Statutes, sections 1078, 1443), and it is even doubtful if a special act of the Legislature could be constitutionally enacted, as where a general law can be made applicable a special one shall not be enacted.

Nor do we find any difficulty in determining the appellants to have been the trustees of the town of Berry at the time of the institution of this suit. They had been regularly elected under the old charter for one year from April, 1893, and while section 167 of the Constitution provided for a termination of their offices at the November election, 1893, it provided that the old officers should yet hold until their successors should be elected and qualified.

In the Wilson-Johnson case, 95 Ky., 415, the successor of the old officer was in fact elected at the November election, 1893, and the old officer was not entitled to hold thereafter. In answer to his contention that he might so hold over, we said: "It is true he was to hold until the general election in November, 1893, *and* until his successor was elected and qualified, but this is the usual method provided to prevent a vacancy, when from some unforeseen circumstance no election has been held at the regular time,

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or some time must elapse until the succeeding officer shall qualify and be inducted into the office."

Here there was no election held in the town of Berry in November, 1893, and under the express terms of the Constitution the appellants were entitled to hold over, and were, therefore, not usurpers, as contended by appellees. The act of March, 1894 (section 3672, Kentucky Statutes), was passed to cure any possible doubt of the legality of the acting trustees of towns of the sixth class, arising out of the failure of many of those towns to elect trustees in November, 1893, and was not enacted, as contended by counsel, in recognition of the alleged fact that there were vacancies in those offices, or that the acts of the hold-overs were void. Such a legislative declaration, if made, would have been inoperative as an unauthorized interference with the functions of the judiciary in the exercise of its exclusive right to construe and interpret the laws.

We conclude, therefore, that upon none of the grounds relied on are the appellees entitled to the relief granted by the perpetuation of the injunction, and the judgment below is reversed with directions to dismiss the petition.

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CASE 18—AGREED CASE—APRIL 2.

Schuff v. Pflanz

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APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. SHERIFF—WHEN FAILURE TO EXECUTE NEW REVENUE BOND IN TIME FORFEITS OFFICE.—The legislature may authorize a county court to declare the office of sheriff vacant upon the failure of that official to renew either his general official or his revenue bond witnin a specified time, and consequently section 4131 of the Kentucky Statutes granting this power to the county court is constitutional.
2. ACCEPTANCE OF BOND AFTER THE TIME FIXED IN THE STATUTE.—But the county court has the power, notwithstanding the statute requires the bond to be executed by a certain day, to accept the bond on a day subsequent thereto; and having so accepted it, it is then too late to declare the office vacant.

   County courts have the power under the present revenue law to take new or additional bonds at any time.
3. Both the general official bond and the original revenue bond executed by a sheriff cover the entire term for which he was elected, and not merely one year as contended; and the sureties in them, together with those in the several renewal bonds required, are bound for any default which may occur during the term for which they may be executed.

KOKN, BAIRD & SPINDLE FOR APPELLANT.

1. A public office can be vacated without a direct judicial proceeding against the officer. (Stokes v. Kirkpatrick, 1 Met., 139.)
2. There is no contract or property right in a public office. (Williams v. Newport, 12 Bush, 438; Cooley's Constitutional Limitations, 336.)
3. Sureties on the sheriffs' general bond are not liable for default in collection of the revenue. (Anderson v. Thompson, 10 Bush, 134; Commonwealth v. Adams, 3 Bush, 41; Kenton Co. v. Lowe, 91 Ky., 369.)

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4. The revenue bond required of sheriffs is an official bond. (Commonwealth v. Adams, 3 Bush, 41; Anderson v. Thompson, 10 Bush, 134.)
5. Sureties on the renewal of the sheriff's general bond are co-sureties with those on the original bond. (Ridgeway v. Thompson, 91 Ky., 582; Kettler v. Thompson, 13 Bush, 288.)
6. The revenue bond is good only for one year. It is an annual bond, not a renewal of a bond. (Ky. Statutes, sec. 4131; Yarborough v. Commonwealth, 84 Ky., 496; Hall v. Commonwealth, 8 Bush, 378; Commonwealth v. Magoffin, 15 Rep., 775.)
7. Section 227 of the Kentucky Constitution does not contain all the constitutional provisions for the vacation of the office of sheriff. (Ky. Constitutional, sec. 99, 150, 151, 103, 238; Gordon v. Fox, 16 Rep., 653.)
8. Failure to give the annual revenue bond is neither misfeasance, malfeasance nor willful neglect of official duty. (Williams v. Commonwealth, 79 Ky.; Bouvier Law Dictionary, title Misfeasance and Malfeasance; Curry v. Stewart, 8 Bush, 363; Lowe v. Commonwealth, 3 Met.)
9. The same constitutional and statutory provisions with regard to the requirement of an annual revenue bond from sheriffs have existed ever since Kentucky has been made a State. The changes made have been in the direction of greater strictness. (Stokes v. Kirkpatrick, 1 Met., 140; Catchings v. Davis, 3 B. Mon., 61; second Constitution of Ky., Article 4, Section 18, Statute of 1799; Bartley v. Fraine, 4 Bush, 376.)
10. Under Sec. 238 of the Constitution of Kentucky the county court can declare vacant the office of sheriff on failure to give a bond to relieve other sureties. (Bartley v. Fraine, 4 Bush, 376; Distinguishing Lowe v. Commonwealth, 3 Met.)
11. Section 103 of the Kentucky Constitution permits the vacation of the office of sheriff on failure to give bond as was done in this case. (Catchings v. Davis, 3 B. Mon., 61; Bartley v. Fraine, 4 Bush applied; Lowe v. Commonwealth, 3 Met., distinguished; Brown v. Grover, 6 Bush.)
12. The reports are full of judicial dicta and precedence supporting the appellant's title to the office. (Calloway v. Commonwealth, 4 Bush, 385; Commonwealth v. Yarborough, 84 Ky., 496; Commonwealth v. Mc Magoffin, 15 Rep., 775; Lowe v. Phelps, 14 Bush, 642; Catchings v. Davis, 3 B. Mon.; Patton v. Layer, 4. J. J. Mar., 250; Basham v. Commonwealth, 13 Bush, 38; Commonwealth v. Cook, 8 Bush, 232; Cate v. Ross, 2 Duv.; Grundy v. Commonwealth, 12 Bush, 352; Anderson v. Thompson, 10 Bush, 134; Elliott v. Kitchen, 14 Bush, 289; Commonwealth v. Adams, 3 Bush, 41; Jones v. Gallatin Co., 78 Ky., 491; Fletcher v. Light, 4 Bush, 309.)

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DODD & DODD and SAMUEL B. KIRBY FOR APPELLEE.

1. Section 4131 of the Kentucky Statutes when it speaks of the "failure of the sheriff to execute bond and qualify" refers to and applies only to the original bond which he gives upon assuming the duties of his office, and not to the renewal or annual bonds. (Meacham, secs. 253 and 254; Endlich on Interpretation of Statutes, sec. 2; Meacham on Public Officers, sec. 262; Throop on Pub lic Officers, sec. 173.)
2. Section 4131 of the Kentucky Statutes should be read *in pari materia* with sections 68, and 227 of the Constitution, and presupposes that before the county court can consider the question of vacancy on the ground of forfeiture of office, there must have been a judicial determination of the questions authorized to be inquired into by sections 68 and 227 of the Constitution, and in the mode therein provided. (Page v. Hardin, 8 Monroe, 648; Lowe v. Commonwealth, 3 Met., 237; Brown v. Grover, 6 Bush; 4 Bush, 331 and 375; 79 Ky., 47; 86 Ky., 187; 85 Ky., 466; 12 Bush, 379; 10 Bush, 750; 77 N. C., 408; Throop on Public Officers, sec. 305, 402 and 341 and cases there cited; Meacham on Public Officers, sec. 450.)
3. The limit of a county judge's power is the right to inspect and examine the sufficiency of the sureties thereon. (Throop on Public Officers, secs. 170, 172 and 173.)

E. W. HINES & W. H. NEWHALL, JR., ON SAME SIDE.

1. Section 4134 of the Kentucky Statutes confers authority upon the county judge to take additional bond or bonds at any time. This power was not conferred in the previous revenue law, and decisions under that law are inapplicable.
2. The coupling of the execution of the bond with the qualification in section 4131 shows that reference is there had to the bond to be executed by the sheriff when he qualifies.
3. The requirement that a new bond shall be executed on or before the first Monday in January, is intended to serve no other purpose than to insure an inquiry by the county judge as to the sufficiency of the sureties on the existing bond, and it is to be regarded as directory merely as to the time fixed for the execution of the bond. (Endlich on Interpretation of Statutes, sec. 436.)
4. The county judge in the exercise of a manifest discretion given him by the statute, having failed to make the order declaring the office vacant because of the failure to execute the bond in the

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specified time, and having accepted a bond subsequent to that time, can not afterwards exercise that discretion and declare it vacant.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This proceeding was had under section 637 of the Code of Practice, with a view of determining the title to the office of sheriff, of the county of Jefferson, the appellant, Schuff, and the appellee, Pflanz, each claiming the right to discharge the duties pertaining to that office.

The agreed facts show that the appellee, Pflanz, was the duly elected sheriff of the county of Jefferson for the term of three years. The election took place in the month of November of the year 1894, and on the first Monday in January, 1895, he, together with his deputies, entered upon the discharge of their duties. He had, prior to that date, executed his bonds as sheriff and qualified in the manner provided by law. Having been in office for nearly one year, he settled his accounts with the auditor of State shortly before the first of January, 1896, and obtained his quietus from that official, and, on the 11th of January, 1896, executed his annual revenue bond, which was approved and accepted by the judge of the Jefferson county court.

After this had been done, the county judge, on the 17th of January (the same month), came to the conclusion that Pflanz had forfeited all right to the office of sheriff by reason of his failure to execute this annual bond on or before the first Monday in January of that year (1896), and thereupon entered an order declaring the office of sheriff vacant, and appointed the appellant, Schuff, to fill the vacancy.

The sheriff, by virtue of section 4129, Kentucky Statutes,

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is made collector of all State, county and district taxes, unless the payment is directed by law to be made to some other official, and from sections 4130 and 4131 originated the alleged cause for removing the appellee, Pflanz, from his office. Section 4130 provides: "The sheriff shall, on or before the first Monday in January next succeeding his election, and on or before the said day annually thereafter, enter into bond, with surety, for the faithful performance of his duties. A quietus from the auditor for the revenue tax for the preceding year shall be produced by each sheriff to the county court on or before that day; and no tax book shall be delivered to a sheriff, after the first year of his term, who shall fail to exhibit his quietus on or before such date."

The county court, by this section, is made the judge of the sufficiency of the surety.

Section 4131 provides: "On the failure of the sheriff *to execute bond and qualify*, as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff to fill the vacancy until a sheriff is elected, or it may appoint a collector for the county of all moneys due the State and county and taxing district authorized to be collected by the sheriff," etc.

Section 4134 provides: "The county court may require the sheriff to give an additional bond or bonds, with good surety, to be approved by the county court whenever it may deem the interest of the State or county demands; and the sureties on all the bonds executed by the sheriff shall be jointly and severally liable for any default of the sheriff during the term in which said bond may be executed whether the liability accrued before or after the execution of such bond or bonds."

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It is conceded in argument, as well as by the agreed facts that Pflanz, the appellee, had fully complied with the statute by executing his bond for the collection of the revenue, as well as his general bond as sheriff (both in fact official bonds), but it is claimed that his failure to execute his bond for the collection of the revenue for the second year, on or before the first Monday in January, 1896, worked a forfeiture of the office, and the county judge was compelled to enter an order declaring him no longer sheriff.

The learned judge below, in the investigation of this question, reached the conclusion that the statute, under which this forfeiture was had, is in violation of the State Constitution. Section 227 of that instrument provides: "That judges of the county court, justices of the peace, sheriffs, coroners, surveyors, etc., shall be subject to indictment or prosecution for misfeasance or malfeasance in office or wilful neglect in discharge of official duties in such mode as may be prescribed by law, and, upon conviction, his office shall become vacant; but such officer shall have the right of appeal to the court of appeals."

In this case it is not pretended that Pflanz was guilty of misfeasance or malfeasance in office or that he was guilty of a wilful failure to discharge his duties as sheriff, and it, therefore, follows, if the proceeding by indictment or presentment, for the causes designated in section 227 of the Constitution, must be adopted, there is no mode pointed out by that instrument by which such an officer as sheriff can be removed upon his refusal to qualify or to execute an annual bond, as required by the statute, leaving his sureties, the State, county and district without any protection, unless for causes that amount to misfeasance or malfeasance in office.

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While the case of Lowe v. Commonwealth, 3 Met., 237, conduces to sustain the view taken of this case in the opinion, below, it was held in the later case of Bartley v. Traine, 4 Bush. 375, the county courts had the constitutional power to remove sheriffs from office for failing to give new bonds, and distinguished the latter case from that of Lowe v. Commonwealth, where the jailer of Mercer county was attempted to be removed for misfeasance in office, and in repeated adjudications it has been, in effect, held that such a power could be delegated to the county court.

Section 99 of the Constitution creates the office of sheriff and fixes the term, and section 100, the qualifications, and, although section 227 specifies some of the causes and the mode of removing a sheriff, other causes are found in the Constitution for which the office may be vacated, and there is nothing in that instrument that prohibits the Legislature from giving to the county courts plenary power, as to the time and manner in which such officials are to execute their bonds, and to declare the office vacant upon their failure to comply with the statute.

Section 103 of the Constitution provides: "That the sheriff (with other officers) and such other officers as the General Assembly may from time to time require shall, before they enter upon the duties of their respective offices, and as often thereafter as may be deemed proper, give such bond and security as may be prescribed by law."

This power having been conferred, it necessarily follows that, when exercised, the power exists to enforce compliance with the statute as to the bonds to be executed and the time for their execution. The appellee, when elected to fill the office of sheriff, could exercise none of its duties until he

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qualified by giving bond with such surety as might be approved by the county court, and in the absence of said qualification, the county would in fact be without a sheriff, and it would be absurd, in such a state of case, to hold that no power existed to vacate the office, but that resort must be had to an indictment or presentment for the failure of the sheriff to qualify.

The question does not affect the discharge of official duty, but pertains to the qualification of the officer that must precede the exercise of any of the duties of the office, and extends to the exercise of the further power, after the officer has qualified, on the part of the county court to see that the State, county and the citizens are protected against the acts of an insolvent official, by requiring additional security, as in the case of the sheriff, by the execution, every year, of a new bond or a renewal bond.

The exercise of this power has been conferred upon the county courts since the formation of the State government, and the power to require the execution of official bonds when qualifying and after qualification by the county court, and the failure to comply by the official to remove him or vacate his office, is now too well settled to admit of controversy. In fact it would be difficult to maintain our State government, with the collection of its revenues entrusted with those whose duty it is to give bond for the discharge of its duties, and yet with no power on the part of the State to compel its execution, and a resort only to the slow process of the law by indictment and a conviction, upon which rests the power to vacate the office or remove the official. In our opinion the statute in question is constitutional.

This brings us to a consideration of the various sections of the statute under which this power is claimed to exist.

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If, as counsel for the appellant contends, the sureties in the bond for the collection of the revenue are only liable for the default of the sheriff for the one year, and are in nowise liable for any succeeding year of the term, without signing a new bond, there is much force in his conclusion, as, with such a complication, the county of Jefferson, the sheriff failing to execute a bond on the first Monday in January of the second year, would be without a collecting officer, but, on the contrary, if the sureties on the revenue bond, at the date of the qualifications of the sheriff, are liable for the whole term, then it follows, if the bond be accepted for the second year, before any entry of an order declaring the office vacant, the sufficiency of the bond being conceded, the judge had no power to declare the office vacant and Pflanz, by reason of his being sheriff and the execution of that bond, is the collector of the revenue and his sureties liable for his default in collecting or failing to pay over.

Section 4131 provides: "On the failure of the sheriff to *execute bond and qualify*, as hereinbefore provided, he *shall forfeit his office.*"

The right of forfeiture under this section is made to depend upon his failure to qualify; and, by section 4130, he is permitted to execute bond at any time before the 1st of January. Pflanz, as appears, did qualify in the proper time, by giving bond satisfactory to the county court, and entered upon the discharge of his duties, but failed to execute his annual bond on or before the first Monday in January, 1896, and it is maintained that the failure to execute this bond worked a forfeiture and authorized the county judge to declare the office vacant.

Pflanz was still in the office of sheriff; had qualified with the execution of a bond that afforded ample protection to

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the State and the county for all the revenue that might come to his hands. The sureties on his bond, at the date of his qualification, bound themselves as such for and during the entire term of his office. This bond, provided for by section 4133, was not for the collection and payment over of the revenue for the year 1895, but stipulates that "we, A B, sheriff, and C D and E F, his sureties, bind and obligate ourselves, jointly and severally, to the Commonwealth of Kentucky, that the said A B, sheriff, shall faithfully perform his duties," etc. And the next section (4134) empowers the county court to require the sheriff to give an additional bond or bonds where the interest of the State or county demands it, and the sureties on all the bonds shall be jointly and severally liable for any default of the sheriff during the term in which said bond may be executed, whether the liability accrued before or after the execution of the bond or bonds. These bonds are not taken for one year, but bind the sureties for any default during the term for which they may be executed; and it can not well be said the sureties in these additional bonds are liable for the whole term and those on the original bond are liable for one year only. So we have a case where the qualification has been perfect and complete and a statute providing only that a failure to *execute bond and qualify* shall forfeit the office. Qualification means the execution of the bond, the oath of office. The question then arises, if the sheriff fails to give this annual bond for the collection of the revenue, can the county judge declare the office vacant?

The sheriff is required to give two bonds—one for the collection of the revenue and the other known as the general official bond.

Under the title of "Sheriffs," section 4557, it is provided:

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"It shall be the duty of the county court to cause the sheriff, annually, to renew his bond required by this chapter, and oftener if the court may deem proper; and, upon his failure to do so, the court shall enter up an order suspending him from acting until he gives said bond, or the court may vacate his office."

This statute should be construed in connection with the revenue statute, and it is manifest that a fair interpretation of the legislative meaning is that, upon the failure to execute any bond required of this official, for the protection of the State, county or citizen, the county court may remove him from office; and particularly where by statute it is made the plain duty of the official to execute the bond on a particular day. The duty then devolves on the sheriff and he must comply with the law; but it does not follow because the sheriff fails to renew his general bond or to give an annual bond for the collection of the revenue that the county judge is powerless to accept a bond after the first Monday in January. He may, it is true, vacate the office, but before he does this he accepts a bond that is in addition to or a new bond, upon which the last sureties became jointly liable with the sureties on the first bond. It is a bond sufficient to satisfy the court that all will be protected who are interested in its execution, and when accepted, the sheriff having previously qualified, it is then too late to enter an order vacating the office.

In the case of Ridgeway v. Moody's adm'r, 91 Ky., 581, it was held that the sureties on the original bond were liable as well as those on the renewal bond, as the bond did not fix any other or less period, and if so, we perceive no reason why the same rule should not apply to the bond for revenue, and the greater the necessity for placing such construction

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on that statute, for the sheriff in this one county collects nearly one-fifth of the revenue of the State, and to adjudge that, on the general bond, the sureties on the first bond are liable for the whole term, but on the revenue bond for only one year, not only lessens the security for the performance of these duties, but is in opposition to the plain intention of the Legislature.

In the case of the Commonwealth v. Yarbrough, 84 Ky., 496, this court held a revenue bond void because no authority was conferred on the county judge to accept a new bond after the first Monday in January; but it will be found that, in revising the present revenue law, the county judge is empowered to exact additional bond whenever the interest of the State requires it; and still we are asked to enforce this forfeiture, although the bonds previously executed are still in full force and effect and ample to meet all liabilities incurred by the sheriff, and when it is conceded the county court accepted this annual bond before any order of forfeiture was entered.

A construction rational as to the results flowing from it, and in accord with the plain legislative intent that makes the sureties bound for the whole term, obviates the difficulties under which the State has been laboring for years in making sureties liable on these official bonds and secures the revenue and levy to which the State and counties are entitled.

The provision in section 4131 for a forfeiture "on the failure of the sheriff to *execute bond and qualify*" can not be made to apply to the subsequent bonds in cases where the county judge has accepted the annual or renewal bonds before any order of forfeiture is entered.

For these reasons the judgment below is affirmed.

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CASE 19—PETITION EQUITY.—APRIL 2.

Bement v. Ohio Valley Banking & Trust Co.

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APPEAL FROM HENDERSON CIRCUIT COURT.

1. LIMITATION—ASSUMING DEBT OF ANOTHER.—Where one assumes the debt of another, in consideration of the conveyance to him of real estate, the contract being in writing, it is a subsisting liability against him, and the fifteen-year statute of limitation is applicable thereto.

   And an assignment of that claim by the creditor to the party assuming it, which was without consideration and disregarded by the parties themselves, will not be treated as effectual for any purpose.

2. LIMITATION—RELEASE WITHOUT CONSIDERATION.—The plea of limitation can not avail in upholding a release from the payment of the recited consideration in a deed, the release being without consideration, and having been executed within ten years before the commencement of the action; and especially where the release was not, and could not with reasonable diligence have been discovered before it was filed in court.

3. EXISTING LIABILITY.—A covenant in a deed by a grantor by which he warrants title and possession to the property conveyed, is an "existing liability" within the meaning of the statute from the time of the execution of the deed; and it is not necessary to await eviction before it becomes such.

4. RES ADJUDICATA.—A judgment of a court of competent jurisdiction is generally conclusive not only as to all matters determined by it, but of all incidental matters which might have been properly litigated and decided in the same suit; but this rule should not be applied where the new issues, being as to material and distinct matters, were not presented and determined in the former action either through the fraud of one party, or the unavoidable casualty and misfortune of the other.

H. F. TURNER & MONTGOMERY MERRITT FOR APPELLANT.

1. In the deed from Joseph G. Adams to John C. Adams it is recited

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that the consideration is to be paid to Joseph Adams; that is a written contract upon which Joseph Adams might bring suit at any time within fifteen years. (Elliott v. Saufley, 10 Ky. Law Rep., 958.)

2. The conveyances do not indicate any fraud on their faces, and recite valuable considerations. It is not shown that Bement had any notice, or could have learned by reasonable diligence that they were fraudulent or voluntary. Therefore, Bement's right of action for relief did not accrue until the discovery of the fraud, which was within ten years. (Gen. Stats., page 892; Wood v. Thomas, 81 Ky., 452; Brown v. Connell, 9 Ky. Law Rep., 28.)
3. Any one liable upon a contract, express or implied, though only contingently, is a debtor from the time the liability is entered into. (Hardt v. Courteny, 4 Met., 143; 1 Amer. Leading Cases, p. 42-73; Alexander v. Quigley's Exor., 2 Duvall, 404; Wait on Fraudulent Conveyances, sec. 90, 20 Ala., 741; 36 Ind., 7.)
4. Under the pleadings in the suit to settle the estate of Jos. Adams there could have been no adjudication as to the fraudulent transfer of the lands, and consequently the judgment in that suit can be no bar to this one.

R. H. CUNNINGHAM AND S. B. & R. D. VANCE FOR APPELLEE.

1. An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and matters of defense. (Freeman on Judgments, 249.)
2. Warranty of the title to real estate does not make the warrantor a debtor within the meaning of our statute which declares void as to existing liabilities all gifts, conveyances, assignments, etc., without consideration. The warrantor only becomes a debtor upon the breach of his warranty. (Slater v. Sherman, 5 Bush, 206; Evans v. Lewis, 30 Ohio St., 11.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Joseph Adams, having died in 1884 intestate, his son, John C. Adams, was appointed administrator, and in 1885 brought an action in equity to settle the estate, against which, how-

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ever, he set up individuals demands, arising from alleged payment of debts as surety of decedent, greater in amount than assets reported.

In 1888, C. R. Bement becoming on his petition a party defendant, filed an answer, made cross petition against John C. Adams. In it he stated and also showed that in 1880, Joseph Adams sold and by deed of warranty conveyed to him a tract of land, a dower estate in which, of value about $6,500, E. S. Adams, his widow, sued for and recovered in 1885, and he had consequently a subsisting demand for that sum and interest against the estate of decedent. He further stated for cause of cross action that John C. Adams did not have made and reported a true inventory and appraisement of the estate, but collected and converted to his own use proceeds of policies of insurance on the life of Joseph Adams, and also a government claim that rightfully belonged to the estate.

In defense John C. Adams stated that the policies and government claim were given to him by his father, and that he was entitled to the whole proceeds thereof, without any deduction on that account from the amount of his demands against the estate.

Judgment was rendered in that action August 19, 1891, dismissing the cross petition of Bement, though $2,447 of his demand was directed to be paid *pro rata* out of other assets in the hands of the administrator. That part of the judgment relating to the individual demands of John C. Adams is in these words: "It is adjudged that the gift by Joseph Adams, deceased, to plaintiff, John C. Adams, of the several policies of insurance, and the claim against the United States, were intended in part to indemnify him (said John C. Adams) against loss on any debt then owing, viz, at the

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gift and delivery of said policies and claim by said decedent to said John C. Adams, and any debts on which said John C. Adams was then bound as surety for said decedent; and, therefore, it is further adjudged that said John C. Adams shall not be allowed any claim against his decedent's estate for any such debt due to or paid by him."

That judgment was, December 10, 1894, affirmed on appeal by John C. Adams and on cross appeal by C. R. Bement.

August 21, 1891, Bement, having obtained a judgment against John C. Adams, as administrator for residue of his demand, upon which was issued an execution returned no property found, brought the present action to subject certain real property claimed and held by John C. Adams, since deceased, in his own right.

The different parcels so held and claimed are alleged and appear to have been acquired under these circumstances:

1st. August 23, 1881, Joseph Adams executed to him a mortgage on a debt he had against J. G. Adams, another son, for about $3,000, besides other property, to indemnify him as surety in the Farmers' Bank, and to the First National Bank on debts therein described. Subsequently Joseph Adams brought an action against J. G. Adams for judgment on the debt, obtaining and causing to be levied an attachment upon a tract of eighty acres of land. But October 2, 1884, that action was compromised, and for the recited consideration of $2,100 paid, and undertaking by the vendee to pay off and discharge the claim of Joseph against himself, J. G. Adams then conveyed to John C. Adams said tract of eighty acres.

2d. June 1, 1882, Joseph Adams, for the recited consideration of $12,000, which John C. and Robert G. Adams had paid and assumed to pay for him, sold and conveyed to them various lots or parcels of land described in the deed.

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3d. In an amended petition, filed February 14, 1893, plaintiff stated that in March, 1891, Joseph Adams, having previously purchased from and paid the heirs of Chas. Clay for a certain lot described, directed them to convey and they did convey it as a gift from him to John C. Adams. It is, however, alleged that if any part of the consideration for that transfer was valuable it was so because intended to further indemnify John C. Adams, as surety.

The first ground of defense to the action we will consider is that of limitation.

It appears that the indebtedness of J. G. to Joseph Adams was by open account, and in order to avail himself of the statute limiting actions for relief for fraud to ten years, defendant alleged that the claim was January 23, 1881, without valuable consideration, given to him by his father and filed what purports to be a written assignment of it of that date. But that transaction was evidently not regarded by the parties, nor should be now treated as effectual for any purpose, because in 1884, on compromise of the action brought by Joseph Adams to recover on that identical claim and release of his attachment upon the tract of eighty acres, John C. Adams undertook and promised to pay to him the full amount thereof as part consideration of the conveyance of said tract by J. G. Adams, and as it is plain Joseph Adams might, while living, have maintained an action on that promise, there is no reason why it is not now, nor why, being a written contract, it would not continue a subsisting liability of John C. Adams for fifteen years from 1884.

Defendant also pleaded and filed a written release from payment of any part of the consideration for the conveyance to him and Robert G. Adams, which Joseph Adams executed August 22, 1882. But, as that release was without any valu-

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able consideration and was executed within ten years prior to the commencement of this action, and manifestly was not nor could with reasonable diligence have been discovered by plaintiff until filed, the plea of limitation can not as to it avail. It is, however, a confession that there was then an existing liability of John C. Adams to pay or account for one-half consideration of the conveyance by Joseph Adams to him and Robert G. Adams and the amount of that indebtedness may, nothing to the contrary now appearing, be yet ascertained and subjected to pay creditors of decedent.

But it is argued that the covenant of Joseph Adams to warrant title and possession of the land conveyed to Bement in 1880 was not until 1884, an existing liability in the meaning of the statute, and, consequently the release then executed, although a gift without valuable consideration, was not void as to it. It seems to us such a position can not be sustained without giving to the phrase "existing liabilities" a meaning more restricted than is reasonable or was intended by the Legislature. We, however, regard the question settled by this court in Garrard v. Garrard, 7 Bush, 436.

It is not definitely stated or shown that John C. Adams incurred any liability to Joseph Adams on account of the conveyance by Clay's heirs, but the allegation is the transaction was fraudulent, and as it occured more than ten years before the amended petition was filed the plea of limitation must be sustained.

The main question is whether the judgment rendered in the action to settle the estate of Joseph Adams is a bar to this.

Dismissal of the cross action of Bement, we think, in-

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volved a decision merely that the proceeds of the insurance policies and government claim were not subject to the demand of Bement or, for that matter, of any other creditor of the estate, because they were, as said by the court, intended to indemnify John C. Adams against loss on any debt then owing to him by, or any debt on which he was surety of, Joseph Adams. But said proceeds appear to have amounted to as much as his individual demands, a list of which was filed, and, consequently, it was at the same time adjudged none of the demands should be allowed.

The effect of that judgment was to offset the demands of John C. Adams with proceeds of the policies and government claim, and it does not in terms or meaning preclude Bement, or creditors generally, from subjecting other property of the estate in the hands of and improperly withheld by John C. Adams as administrator from cognizance of the court in that action.

But it is a rule often recognized by this court that a judgment of a court of competent jurisdiction is, in general, conclusive, not only as to all matters determined by it, but all incidental matters which might have been properly litigated and decided in the same suit; and as the property, which in this action it is alleged constituted part of the estate of Joseph Adams, and, therefore, subject to payment of debts against it, is a matter that might—indeed, ought to have been—litigated in the other action, the judgment in question, according to rigid application of that rule is a bar to the relief now prayed for. But the rule being adopted by reason of necessity for some end to litigation, and because more injustice would generally result from reviving old issues than from limiting the right to prosecute actions, should not be applied where the new issues, being as to

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material and distinct matters, were not, either through fraud of one party or unavoidable casualty or misfortune of the other, presented and determined in the former action.

As that action was instituted by John C. Adams in his fiducial character, and he had, by reason of personal connection with it, actual knowledge of the condition of the property now in litigation, it was his duty to then report it to court as part of the estate, or at least submit for decision of the court all questions properly relating to it. But having, instead, withheld it from the notice of the court to the prejudice of heirs and creditors, he should not now be allowed, in virtue of the rule in question, to profit by his own wrong. Clearly his conduct would have entitled the present plaintiff to a new trial of the former action, if applied for in proper time, and we see no reason why the court may not now ascertain the amount of John C. Adams' indebtedness to the estate, and subject it to the debts of the creditors and distribute the surplus, if any.

The judgment is reversed and case remanded for proceedings consistent with this opinion.

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CASE 20—PETITION EQUITY—APRIL 3.

Mason v. Columbia Finance & Trust Co.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. HOMESTEAD—ADJOINING LANDS.—The general doctrine is that before one has a right to a homestead in land, he must have actually lived on it; but where the husband and wife own adjoining tracts of land, and it is all used and cultivated as one farm, the husband will be entitled to a homestead out of the part of the land owned by him, although the house which they occupied was actually on that part of the farm owned by the wife. (Distinguishing Vanmeter v. Vanmeter, 12 Ky. Law Rep., 214.)

C. C. TURNER FOR APPELLANT.

1. A debtor husband is entitled to a homestead in land owned by him, which is contiguous to and used as a farm in connection with an adjoining tract of land owned by his wife, although the house which they occupied was on the wife's land. (Lowell v. Shannon, 60 Ia., 713.)

A. T. WOOD ON SAME SIDE.

1. The whole tract of land, both that owned by himself and that owned by his wife, was occupied in legal contemplation by Mason; and because the house which he occupied happened to stand on that part of the land owned by the wife is no reason why the husband should be deprived of a homestead in the adjoining lands owned by him. It is not indispensable to the use and enjoyment of a homestead right, that there shall be a dwelling house on the exempt property. (Bennett v. Baird, 5 Ky. Law Rep., 636; Derrickson v. Gillespie, 32 S. W. Rep., 1084.)

H. M. WOODFORD ON SAME SIDE.

(No brief in the record.)

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STONE & SUDDUTH FOR APPELLEES.

1. Detached tracts of land, although used and cultivated as a part of the home farm, comprise no part of the statutory homestead. (Thompson on Homesteads and Exemptions, sec. 145; Vanmeter v. Vanmeter, 12 Ky. Law Rep., 214.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The sole question to be determined on this appeal is whether or not the appellant, John Mason, is entitled to a homestead in certain real estate conveyed by him to A. A. Hazlerigg for the benefit of creditors.

The appellant, Mason, and his wife owned jointly a tract of 312 acres of land. The wife owned a part of the tract laid off and designated by metes and bounds in her own right, and the land owned by the husband adjoined the land of the wife, the entire body of land owned by husband and wife containing 312 acres, and used and cultivated as one farm. The house in which they lived was on 25 acres of the land to which the wife had the fee, and the husband's land bordering upon it. The insolvency of the husband caused an assignment for creditors, and in the distribution of assets, his land having been sold, he was denied the right of homestead, or its value, and has appealed.

The case of Vanmeter v. Vanmeter's assignee is relied on as sustaining the judgment below. In that case the husband assigned, having a right of courtesy in a tract of land of his wife, upon which he lived, worth more than $1,000, and this court held he was not entitled to a homestead in both tracts. The land on which he lived or his life estate in it being worth $1,000, and living upon it, he must take that and not his homestead in the tract to which he had the fee. It is insisted that to enable the appellant to assert his right he must have actually lived on the land to which he had the

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fee, and this is the general doctrine on the subject, and often controls the decision of such questions. In this case the appellant, in contemplation of the statute looking to both the letter and spirit of its provisions, was living on the land to which this right is asserted. It was all one tract, so regarded by the parties, used, cultivated and claimed as one tract, and because the house is outside of the boundary of the land to which the husband had the fee it is insisted no right of homestead exists.

The interpretation given the statute by this court is, "that it depends (this right) upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and that the right does not exist where the debtor and his family are permanently located elsewhere."

We think that looking to the purposes contemplated by the statute, that of securing to the debtor this exemption for himself and family, it can not well be maintained that this residence on the one tract of land must be regarded as a permanent location, claimed for no other reason than that the home happened to be located on the land owned in fee by the wife.

In the case of Lowell v. Shannon, 60 Iowa, 713, it was held that where the husband and wife own contiguous tracts of land, and occupy the two tracts as a homestead, with the dwelling on the land of the wife, the wife was entitled to a homestead in the adjoining land of the husband. That the husband occupied this land sold for creditors as a homestead is, we think, unquestionable.

Judgment reversed, with directions to award the homestead in money, as the land has been sold, and direct its payment to the appellant.

Judge Hazelrigg not sitting.

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CASE 21—INDICTMENT—APRIL 3.

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Commonwealth v. Shelton.

APPEAL FROM LINCOLN CIRCUIT COURT.

1. CONSTITUTIONAL LAW—JOURNALS OF GENERAL ASSEMBLY NOT COMPETENT TO IMPEACH ENROLLED BILL.—The journals of the House and Senate are not admissible as evidence touching the manner in which an act was passed.
2. COMPUTATION OF TIME.—Under the general local option law which requires the election therein provided for to be held not earlier than sixty days "after the application" for such election is filed with the county judge, the day on which the application is filed should be counted as one of the sixty days.
3. LOCAL OPTION—INDICTMENT MUST ALLEGE FACTS SHOWING THE LAW TO BE IN FORCE.—Where a local option law by its terms is to go into effect in a particular territory only by a vote of the people thereof at an election therein, to be held only after certain conditions have been complied with, an indictment for a violation of such law to be good on demurrer, must allege facts which show that the act has been put in force as required by its terms. (Overruling Young v. Commonwealth, 14 Bush, 161.)
4. SAME.—An indictment under the local option law which charges that the county judge ordered an election upon the written petition "by a number of legal voters equal to 25 per cent of the votes cast in each of the precincts in said Stanford magisterial district at the last preceding general election" is defective, because the county judge was only authorized to order the election on the application "by written petition signed by a number of legal voters in each precinct of the territory to be affected" equal to 25 per cent., etc.

WM. J. HENDRICK, ATTORNEY-GENERAL FOR APPELLANT.

1. The principles announced in Norman, Auditor, v. World's Fair Commissioners, 14 Ky. Law Rep., 529, have no application in this case.

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W. G. WELCH & W. H. MILLER FOR APPELLEE.

1. The indictment in this case is defective, because,
   (*a*) It does not allege that 25 per cent. of the legal voters of each precinct of Stanford magisterial district signed the petition asking for the election.
   (*b*) It does not show that 25 per cent. of the legal voters of the magisterial district petitioned for the holding of the election.
   (*c*) It shows that the election was held earlier than sixty days after the application was lodged with the county judge.
   (*d*) It shows that the petition was filed and the election held under the act of August 6, 1892, but the indictment is for an alleged violation of section 2557 of the Kentucky Statutes which was not passed until the 10th of March, 1894, and imposes a penalty upon those violating the provisions of the local option law.
2. It is manifest from the language of the statute, that the legislative intent was that the petition should be signed by a number of voters equal to 25 per cent. of the votes cast in each precinct of the territory to be affected, instead of 25 per cent. of the voters of the whole district.
3. If an indictment charges unnecessary facts, and by so doing shows that no offense has been committed, or that, as in this case, a law depending upon the sanction of a popular vote, has not been put in force thereby, the indictment is not good on demurrer.
4. The agreed facts in this case admit that the local option law was not passed in the manner required by section 46 of the State Constitution, and the act is therefore void. (Norman, Auditor, v. World's Fair Board, 14 Ky. Law Rep., 529.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The indictment charges that the accused, on the 15th day of May, 1895, unlawfully sold spirituous, vinous and malt liquors in Stanford magisterial district. The indictment is under the "Local Option Law." The election to determine whether or not liquors should be sold in the Stanford magisterial district was held under the local option act of 1892.

It is contended the act is invalid because the Journals of the House and Senate relating to the passage of the act show a certain state of facts with reference thereto. The

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Journals are not admissible as evidence for the purpose mentioned. The act in question must be accepted as having been constitutionally passed. (Lafferty, county judge v. Huffman, &c., *ante.*)

This question was so fully considered in the opinion in that case it is unnecessary to discuss it here. The petition was lodged with the judge of the county court on the 25th day of January, 1894, and on the 26th day of March, 1894, the election was held. The act provides that the election shall not be held "earlier than sixty days *after the application is lodged* with the judge." It does not say sixty days after the day on which the application is made, but says after the application is lodged. The time begins to run after t he act of lodging the application, not after the day on which the application is lodged. In estimating the sixty days the day on which the application for the election is made must be included, and sixty days had elapsed before the day on which the election was held. This interpretation is in accord with numerous decisions of this court. (Wood v. Commonwealth, 11 Bush, 220; Handley v. Cunningham's trustee, &c., 12 Bush, 401; Mooar v. Covington City National Bank, 80 Ky., 305; Chiles v. Smith, 13 B. M., 460.)

It follows the election is not invalid for the supposed reason that the required time had not elapsed from the time of the act of lodging the application therefor until the election. The indictment alleges that "the judge of the county court of Lincoln county, upon a written petition which he had received and filed January 25, 1894, by a number of legal voters, equal to 25 per cent. of the votes cast in each of the precincts in said Stanford magisterial district at the last preceding general election, and which requested him to do so made an order," etc.

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It is not alleged in terms that the application for the election was made by written petition, "*signed by a number of legal voters in each precinct*" of the magisterial district, equal to twenty-five per cent of the votes cast in each of said precincts at the preceding general election. It is insisted that the indictment should charge that the petition was *signed* by the legal voters, and further that the legal voters thus signing the petition were voters in Stanford magisterial district. The indictment charges that upon a written petition, received and filed January 25, 1894, by a number of legal voters, equal to twenty-five per cent. of the votes cast, etc., the order for the election was made directing the sheriff of the county to open a poll in the Stanford magisterial district for the purpose of taking the sense of the legal voters in the district as to whether liquors should be sold in the district. There is a failure to allege that the legal voters who presented the petition were such voters in the precincts of the Stanford magisterial district. It is only on the application "by written petition, signed by a number of *legal voters in each precinct of the territory to be affected*," equal to twenty-five per cent., etc., which authorizes the judge of the county court to make the order for the election. The indictment is defective because it fails to state the petition was by "legal voters in each precinct" of the Stanford magisterial district. It is essential that that allegation should be made, because the first section of the local option law requires that those signing the petition should be "legal voters in each precinct of the territory to be affected" by the election. The indictment is not defective because of a failure to allege the petition was signed. To say as the indictment does, that upon the written petition by a number of legal voters, etc., the order

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for the election was made, imports that the legal voters presenting it had signed it. This opinion (as have been many others by this court), is in conflict with Young v. Commonwealth, 14 Bush, 161.

That case was under the former local option law, which provided for taking the sense of the voters as to whether or not liquors should be sold in a given territory, and the court said: "An indictment under the act should charge the defendant with the offense of selling spirituous, vinous and malt liquors without a license therefor, and contain a statement of the acts done by him, which constitutes the offense, and of the place where the acts were done, as in Civil District No. 5, in Meade county, and that the defendant had no license authorizing him to so sell."

In many cases the Young case has been followed, the court holding that when an act can only be put in force by taking the sense of the legal voters of a given territory the court can not take judicial notice of the acts which are essential to be done to put it in force. In other words, the court does not judicially know the act, thus depending upon the will of the legal voters, has been put in force. We think the better rule is to require the indictment to allege a state of facts which show that the act has been put in force as required by its terms. In so far as this opinion is in conflict therewith, Young v. Commonwealth is overruled.

For the reasons we have given the judgment is affirmed.

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CASE 22—PETITION EQUITY—APRIL 4.

Brooks-Waterfield Co. v. Frisbie, et. al.

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APPEAL FROM HARRISON CIRCUIT COURT.

1. FRAUDULENT CONVEYANCE—HUSBAND AND WIFE.—Where an insolvent husband pays out of his own means part of the purchase price on real estate, which is conveyed to his wife, his interest therein may be subjected to the payment of his antecedent debts. The evidence in this case shows that the husband had at least an interest worth $3,000 in the property sought to be subjected.
2. EARNINGS OF INSOLVENT HUSBAND.—Where the increase in value of the wife's property and the accumulation of her property and means is chiefly due to the labor and skill and energy of the insolvent husband, a part of such increase and accumulation may be treated as his earnings, and subjected to the payment of his debts.
3. GIFT BY HUSBAND TO WIFE.—CONTRACT.—Such earnings can not be legally given to the wife by him, so as to defeat the claims of his creditors; and the fact that the husband engaged to render services to the wife at an inadequate price can not change this principle.

T. T. FORMAN FOR APPELLANT.

1. The courts by conferring upon the wife of an insolvent debtor the right to trade as a *feme sole*, do not give to him the right, by acting as agent for her, to place his own earnings beyond the reach of his creditors. (Moran v. Moran, 12 Bush, 303.)
2. The evidence in this case shows beyond doubt that the property of the wife was greatly increased, and large accumulations made therefrom, solely by the energy, efforts and business foresight and sagacity of the husband.
3. A decree empowering the wife to trade as a *feme sole* is no barrier to subjecting the property of the husband to the payment of his debts even though the property stands in the name of the wife.

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(Carter Bros. v. Martin, 12 Ky. Law Rep., 837; Carson v. Jones, Mss. Opinion Superior Court, decided February 1, 1893.)

W. S. CASON, ON SAME SIDE, IN RESPONSE TO PETITION FOR REHEARING.

1. Where the rents and profits of the wife's lands are so increased by his labor or means as to exceed the necessities or comforts of his family, the excess which is traceable to his labor or means may be subjected to his debts, after as well as before she is empowered to trade as a *feme sole*. (79 Ky., 497; 6 Bush, 159; 91 Ky., 294; 96 Ky., 425.)

J. T. SIMON FOR APPELLEE.

1. A life has the right to invest rents received by her, in real estate with the consent of her husband. (Howard v. Tenny, 85 Ky., 52.)
2. If a wife, after being empowered to act as a *feme sole*, can trace her money into the business conducted by her husband in her name, she can prevent his creditors from subjecting it to the satisfaction of their claims. (Carson v. Jones, 14 Ky. Law Rep., 667.)
3. The appellant has not established a single one of his many charges of fraud.

J. T. SIMON, J. Q. WARD AND BLANTON & BERRY ON SAME SIDE, IN PETITION FOR REHEARING.

1. The judgment of a chancellor granting the wife the right to trade as a *feme sole* converts the property that the wife then owns or may thereafter acquire, into separate estate. (Penn v. Young, 10 Bush, 626.) And it secures to her the profits of any trade she may engage in. (69 Ill., 624; 67 Barb., 326.)
2. A married woman is entitled to her own earnings including the profits of a business carried on by her with capital which is her separate property, and make contracts with respect thereto as if she were *sole*, enforceable by or against her in legal actions. (46 Wis., 655, 37 Amer. Reps., 824.)
3. Under statutes enabling married women to trade, they may trade precisely as if unmarried; she is as to her business a *feme* sole, and she may do all things incidental to trading in general, and all things usual and proper in the particular trade in which she is engaged. (Young v. Gori, 13 Abb. Pr., 13; Trieber v. Storer, 30 Ark., 727; Camden v. Mullen, 29 Cal., 564; Porter v. Gamba, 43 Cal., 105; Rockwell v. Clark, 44 Conn., 534; Martin v. Ward, 19

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Fla., 175; Nispel v. Laparle, 74 Ill., 306; Wallace v. Rawley, 91 Ind., 586; Tallman v. Jones, 13 Kan., 438; Mitchell v. Sawyer, 21 Iowa, 582; Snow v. Sheldon, 126 Mass., 332; Knowles v. Hull, 99 Mass., 562; Rankin v. West, 25 Mich., 195; Parshall v. Fisher, 43 Mich., 529; Allen v. Johnson, 48 Miss., 413; Nettervill v. Barber, 52 Miss., 168; Youngworth v. Jewell, 15 Nev., 45; Wheaton v. Phillips, 12 N. J. Eq., 221; James v. Taylor, 43 Barb., 530; Abbey v. Deyo, 44 Barb., 397; Nash v. Mitchell, 71 N. Y., 200; Frecking v. Rolland, 53 N. Y., 422; Baum v. Mullen, 47 N. Y., 577; Sannis v. McLaughlin, 35 N. Y., 647; Morgan v. Perhames, 36 Ohio, 517; Silveus v. Porter, 74 Pa., 448; Williams v. Lord, 75 Va., 390; Dayton v Walsh, 47 Wis., 519.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

It appears from the record in this case that prior to 1885 the appellee, H. D. Frisbie, was a prosperous business man, in apparent good financial condition, and that, in addition to his individual business, he was in partnership with—— Lake, but that some disease seized a large number of cattle belonging to him, or the firm of Lake & Frisbie and perhaps some other financial reverses befel him, rendering him, as it seems, unable to pay his debts, and that he made an assignment in 1885, but the firm did not assign.

It also appears that said Frisbie owed about $21,000, and that his assets were about $6,000. About $15,000 of the indebtedness was due to appellee's father-in-law, Judge Day, the other principal creditor being the appellant.

After paying the cost of settling the estate assigned, and also paying the appellee, Mrs. Frisbie, $1,000 for her contingent right of dower in real estate assigned, the estate only paid 18.42 cents to the dollar on the ordinary claims.

Appellant's claim was a debt due from the firm of Frisbie & Lake, and in 1888, it obtained judgment against H. D. Frisbie, surviving partner of said firm, as well as individually, for the s um of $4,872, with interest from the 22d of

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April, 1886, upon which executions were issued and returned no property found, but it also appears that $988.62 was paid on the judgment by the master commissioner, in case of Lake v. Lake, September 8, 1888; also paid by the master commissioner, as it seems, out of the assets assigned as aforesaid, $1,036.52, January 5, 1889.

In 1887 the appellee, Mrs. Frisbie, was by judgment of the court empowered to do business as a *feme sole*. On the 18th of November, 1892, the appellant instituted this action in the Harrison Circuit Court, seeking to subject certain property conveyed to Mrs. Frisbie to the payment of its said judgment.

It is alleged in the petition that the appellee, Mrs. Frisbie, has the legal title to certain parcels of valuable real estate, conveyed under the circumstances set out, viz.: One parcel or lot in Cynthiana, Ky., on east side of Walnut street, between Pike and Pleasant, conveyed to her by W. H. Hutman and wife, 23d of March, 1880, which was made to her at the request of her husband, who, out of his own means, paid therefor $1,100 cash in hand.

It is also charged that, after the creation of the debt sued on, H. D. Frisbie, with the fraudulent intent and purpose to cheat, hinder and delay plaintiff in the collection of its debt, and of which purpose appellee, Mrs. Frisbie, had knowledge, did erect on said grounds two double-brick houses—that is, four dwellings—one of which he and his family occupy; another is held and occupied by their tenant, defendant T. B. Smith; another by one Givens, and the fourth by defendant, Moses Levy, at a rental value of about $25 per month each; that said improvements were erected by H. D. Frisbie out of his own means and property as an investment, and not for use of his family, except as to one

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set of the four dwellings, and cost about $11,000, and are valuable and lasting.

2d. That by deed of 28th of January, 1887, Lewis Day's administrator conveyed to Mrs. Frisbie a lot of ground on the south side of Pike street, fronting on said street, the consideration being $1,560, of which sum H. D. Frisbie paid $527 for the same purpose as before charged, and that Mrs. Frisbie knew of the same and participated in the fraud; that the lot is improved, and rents for about $30 to defendant, Mussellman.

3d. That on February 17, 1892, T. W. Hedges conveyed to Mrs. Frisbie, in consideration of $1,725, a certain house and lot on the east side of Walnut street, $800 cash paid, the residue on time, which notes were assigned to the defendant national bank; that H. D. Frisbie, out of his own means, erected thereon a large three-story brick storehouse, glass and iron front, at a cost of not less than $8,000. The same charges of fraud are made as to the purchasers and improvements.

4th. That upon a lot allotted to Mrs. Frisbie, in settlement of the estate of Lewis Day, H. D. Frisbie, with like fraudulent purpose, erected out of his own means and as an investment, on said lot, a frame warehouse and storehouse, at a cost of about $1,000, the same being valuable and lasting,, and increasing the rental value from nothing to about $30 per month.

The appellant prays that the various parcels of property be put into the hands of a receiver to be rented out, and the rents paid into court, to be apportioned between the plaintiff and Mrs. Frisbie in proportion to the amounts paid by her and that paid by H. D. Frisbie, including the cost of the improvements, except that he asks a sale of the

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third tract named, and asks for all proper and general relief.

The answer of appellees may be considered a traverse of all the allegations of the petition, and in effect alleges that all the purchases and payments were made out of and with the means of Mrs. Frisbie. Appellant in its reply traversed the material averments of the answer. The court upon final hearing dismissed plaintiff's petition, and from that judgment this appeal is prosecuted.

It appears that H. D. Frisbie in some way paid or settled all debts against him except appellant's claim. The testimony conduces to show that Mrs. Frisbie constituted her husband her attorney in fact, to do business for her, and that he engaged extensively and very successfully in business.

He engaged in Cincinnati in business under the sign of King's Royal Germature, and made considerable money, his family then living in Cynthiana, Ky., and finally sold out the business for $12,500. H. D. Frisbie also conducted a furniture, undertaking and wall paper business, under the name of Frisbie Furniture and Wall Paper Co. The name of H. D. Frisbie was for a time on the front of the awning in front of the door, but it was taken down, H. D. Frisbie saying it was put there by mistake.

The proof also conduces to show the rental values to be something like the sums alleged in the petition, and that H. D. Frisbie conducted a paying and profitable business, and was the real manager, Mrs. Frisbie rarely, if ever, paying any attention to the business. He also speculated some in South Dakota, and perhaps in Illinois, some or all being profitable.

Mrs. Frisbie does not testify in the case, but the husband

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does, and from his notion and construction of Mrs. Frisbie's property, including what he claims to have given her before his failure, shows that she had considerable property before she was authorized to trade as a *feme sole.*

The proof conduces to show that all the property claimed by Mrs. Frisbie was, in May, 1893, worth perhaps between $35,000 and $40,000, with perhaps an indebtedness due from her of $10,000 or $11,000.

There can be no doubt as to the fact that Mrs. Frisbie received several thousand dollars from her parents, and that about $1,000 was by her father given to H. D. Frisbie, but which it seems he afterwards undertook to restore to his wife.

We do not deem it necessary to discuss the allegations of fraud made in the petition. It seems clear to us that the increase or accumulation of property and means is chiefly due to the labor and skill and energy of H. D. Frisbie.

In Moran v. Moran, 12 Bush, 303, it is substantially said that all an insolvent husband may be able to earn beyond the exemptions should go to his creditors, yet appellee's contention in this case is that such earnings may legally be given to the wife.

It will not be contended that if the husband had owned property before the creation of plaintiff's debt, or acquired property afterwards, that he could make a gift of the same to his wife and thus defeat the claim of the appellant; and yet if appellee's contention in this case be conceded the same result is reached. The fact that the husband engaged to render service at an inadequate price can not change the principle involved.

It seems to us that appellee, H. D. Frisbie, was at the time of the trial of this case, June 8, 1893, equitably entitled

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to at least $3,000 interest in the property described in the petition and evidence over and above exemptions, exclusive of the homestead, and that this interest, to the extent of $3,000, should have been subjected to the payment of plaintiff's claim, and that the court erred in dismissing appellant's petition.

The judgment is, therefore, reversed and cause remanded, with directions to adjudge a sale of enough of the property, excluding the homestead, to pay plaintiff $3,000, with interest from June 8, 1893, or to place same in the hands of a receiver, to be rented out until the said sum is paid. The chancellor will adopt the mode by him deemed most equitable, and for further proceedings consistent with this opinion.

CASE 23—INDICTMENT—APRIL 4.

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108 69
d108 76
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f131 574
131 584

Louisville & Nashville Railroad Co. v. Commonwealth.

APPEAL FROM MARION CIRCUIT COURT.

1. EXTORTION—PENAL STATUTE VOID FOR UNCERTAINTY.—Section 816 of the Kentucky Statutes, which provides that "if any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or the use of any railroad car upon its tracks or upon any track it has control of, or has the right to use in this State, it shall be guilty of extortion," and the subsequent section fixing a penalty therefor, are void for uncertainty, because they fail to prescribe or fix what is a "just and reasonable rate" by which the railroad could be governed in its conduct.

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WM. LINDSAY, J. W. ALCORN, E. W. HINES, LISLE & McCHORD, WALKER D. HINES AND H. W. BRUCE FOR APPELLANT.

1. Section 816 of the Kentucky Statutes is void for uncertainty, because it prescribes no standard as to what is just and reasonable for the guidance of the railroad corporation, and is in effect an *ex post facto law*, contrary to section 19 of the State Constitution, and section 10, article 1 of the Federal Constitution. (Andrew Jackson, *ex parte*, 45 Ark., 164; L. & N. R. Co. v. Railroad Commission of Tennessee, 19 Fed. Rep., 679; Chicago, &c., R. Co. v. Dey, 35 Fed. Rep., 866, 876; Railroad Co. v. People, 77 Ill., 443; Tozer v. United States, 52 Fed. Rep., 917.)
2. The statute is void because it imposes upon railroad corporations a penalty for extortion, which is not imposed upon natural persons operating railroads, or upon other common carriers. (Schoolcraft's Adm'r v. L. & N. R. Co., 92 Ky., 233; L. & N. R. Co. v. Railroad Commission of Tennessee, 19 Fed. Rep., 679; Sam King v. Crowley, 113 U. S., 709.)
3. Even if the statute were good the indictment in this case is bad, because it merely states the conclusion of the pleader that the rate charged was more than a just and reasonable compensation. (State v. Coggeswell, 3 Blackf., 54; State v. Maires, 33 N. J. L., 142.)
4. In a matter of this sort where no standard of what is lawful is furnished corrupt intent on the part of the accused should be alleged and proved. (Commonwealth v. Stout, &c., 7 B. M., 248.)
5. The court erred in permitting to be read to the jury the reports and recommendation of the railroad commission in this matter.
6. The State by appellant's charter granted to appellant the power to charge and collect the definite sums per mile specified therein for the transportation of persons and of property, and that express grant forms part of the State's contract with it which the State can not impair. (Reagan v. Farmers' Loan and Trust Co., 154 U. S., 393; Stone v. Railroad Co., 62 Miss., 207.)
7. Even if that portion of the charter were in no sense a contract, it would be the law until amended or repealed, and the statute in question here can not be regarded as intended to repeal such a charter provision. The rate authorized by the charter must be regarded as a reasonable rate until the legislature fixes some other standard of reasonableness.

W. J. HENDRICK, W. H. SWEENEY AND H. W. RIVES FOR APPELLEE.

1. The judge of the lower court heard the application for a change of venue and the Court of Appeals ordinarily will not disturb his

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finding on that question. (Johnson v. Commonwealth, 82 Ky., 119; Dilger v. Commonwealth, 88 Ky., 557.)

2. In the administration of government the use of police powers may, for a limited period, be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and more conformably to its wishes. Where property is affected with a public use, the business in which it is used is subject to legislative control. So long as the use continues the power of regulation remains, and it may extend to the prevention of extortion by unreasonable charges, and favoritism by unjust discrimination (The Lake Front Cases, 146 U. S., 387-476; Railroad Co. v. Smith, 128 U. S., 174, 97 U. S., 25 and 659; 101 U. S., 814; 27 Vt., 140; 59 N. Y., 92, 67 Ill., 37; 88 Ill., 221, 16 Ind., 84, 25 Ill., 140.)
3. The power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. (Stone v. Farmers Loan & Trust Co., 116 U. S., 307; Commonwealth v. Covington and Cincinnati Bridge Co., 14 Ky. L. R., 836.)
4. All other modes of transportation having been practically abandoned in this age, we are compelled to patronize railroads; and being so compelled, money thus paid to get necessary services or transportation is in no sense voluntarily paid. (Mobile R. R. v. Stiner, 61 Ala., 559.)
5. Under the amendment in this case provision is made for the consolidation with other companies "so as to make the same *one* company with a consolidated *stock* and property, with *one* board of directors to manage and control the affairs of *said company*. .....With power to adopt such *corporate name* as they might select, and *in such name* have all the powers and privileges heretofore conferred upon such company by the laws of the States of Kentucky and Tennessee." It is clear that the legislature intended that the consolidated company should be a new company, and it necessarily is a new company, although it retains the name of the Louisville & Nashville Railroad Co. (St. L. I. M. & S. R. R. Co. v. Berry, 113 U. S., 465-476; 8 Otto, 359; 5 Otto, 319.)
6. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and the public, is eminently a question of judicial investigation, requiring due process of law for its determination. (134 U. S., 418; 94 U. S., 180; 108 U. S., 536; 116 U. S., 307; 154 U. S., 362; 94 U. S., 155 and 164, and 113 and 134; 96 U. S., 529; 110 U S., 354; 149 U. S., 680; 149 Ill., 361.)

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7. The evidence shows beyond question that the charges complained of were unreasonable, unjust, exorbitant and extortionate.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The indictment in this case charges that the appellant "did unlawfully charge, collect and receive from A. Vancleave & Co. the sum of forty-one and 70-100 dollars as toll or compensation for the transporation of a car-load of coal, weighing 53,800 pounds, being at the rate of one and 55-100 dollars per ton, from Pittsburg, Ky., to Lebanon, in Marion county, over the line of said railroad, a distance of —miles, the said rate of one and 55-100 dollars per ton for the said transportation of said coal, being more than a just and reasonable compensation therefor, contrary to the form of the statute, etc."

A conviction followed, and from the judgment on the verdict of the jury for the sum of $500, the company has appealed.

Its complaints are that the statute prohibiting extortion by railroad companies, and providing a penalty therefor, prescribes no standard as to what is just and reasonable for the guidance of the corporation, and altogether fails to define what it may and what it may not do; that it is, therefore, void for uncertainty; that, even if the statute is valid, the indictment states no facts showing the appellant guilty of the offense charged, but only the conclusion of the pleader that the rate charged was more than a just and reasonable compensation.

It is also urged that the trial court erred in refusing to grant to appellant a change of venue upon the testimony heard, and in the admission of incompetent evidence; and it further insists that, on the facts of the case, the charge is reasonable and just, within the meaning of the statute,

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and especially so as the charge is within the rate allowed by the company's charter.

The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in sections 816 and 819 of the Kentucky Statutes. The first named section reads as follows: "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or the use of any railroad car upon its track, or upon any track it has control of or has the right to use in this State, it shall be guilty of extortion."

Section 819 fixes the penalty for the first offense at not less than $500, nor more than $1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into or through which the road runs, and the Franklin circuit court, are given jurisdiction of the offense, the prosecution to be by indictment or action in the name of the Commonwealth, upon information filed by the board of railroad commissioners.

That this statute leaves uncertain what shall be deemed a "just and reasonable rate of toll or conpensation" can not be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.

The *criminality* of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a

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crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions we are not able to comprehend the force of our organic laws.

In Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee, 16 Am. & Eng. R. R. Cases, 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): "Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The Legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define, with reasonable certainty, what would constitute such "fair and just return." The act under review does not do this, but leaves it to the jury to

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supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence can not know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of four per cent., while another might acquit an accused who had demanded and received at the rate of six per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms."

The Supreme Court of the United States, in Railroad Commission Cases, 116 U. S., 336, refers to this Tennessee case and substantially approves it by distinguishing the case then before the court from the Tennessee case.

This case is also used to support the text in 8 Am. and Eng. Ency. of L. P., 935, where it said: "Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates this is a question which is a proper one for a jury."

Mr. Justice Brewer, in the case of Chicago, &c., R. R. Co. v. Dey, 35 Fed. Rep., 866, had under consideration the provisions of a statute similar to the one we have before us, and while the statute was upheld it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge then said: "Now the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able

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to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In Dwar. St., 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that acts of Parliament ought to be plainly and clearly and not cunningly and darkly penned, especially in legal matters.' See also United States v. Sharp, Pet. C. C., 122; The Enterprise, 1 Paine, 34; Bish. St. Cr., section 41; Lieb. Herm, 156."

And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against any one who should be guilty of "improper conduct," and a statute which makes it a "criminal offense to charge more than a reasonable rate."

The same learned judge, discussing the kindred subject of unreasonable differences in rates, in Tozer v. United States, 52 Fed. Rep., 917, said: "But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

When we look to the other side of the question we find the contention of the State supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused.

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Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury. It is in fact a question of contract. Common carriers are "bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which they are authorized to engage." (94 U. S., 180.)

If this charge is more than is reasonable there is a violation of the contract, and the suit of the person aggrieved is because of such violation.

In some States the shipper is entitled to recover double or triple the amount of the excess, but this does not change the nature of the action.

The nearest approach to an authority for the State's contention is a case in which the shipper sued the carrier, and is reported in Railroad v. Jones, 149 Ill., 361. There the first section of the act under consideration, of which our statute is a substantial copy, was attacked for want of certainty in defining the act of extortion, the contention being that the determination of what is a fair and reasonable rate must depend upon a variety of considerations such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability as affected by the value of the articles carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.

The court said "that the difficulties which stand in the way of determining what are reasonable rates also stand

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in the way of embodying in a legal enactment such an exact definition as is insisted upon. . . . The first section of the statute is merely declaratory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire (Messenger v. Penn. R. R. Co. 31 N. J. L., 407), and the court was to judge of the reasonableness of the freight charges. . . . Undoubtedly the Legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges (Dow v. Bridleman, 125 U. S., 680); but in the absence of statutory regulation upon the subject the courts must decide what is reasonable."

As we have seen, the action was one by a shipper against the carrier, and was in the nature of a suit for damages for a breach of the contract. The court, however, made its meaning clear by references to and approving its former construction of the act as found in Railroad, &c. v. The People, 77 Ill., 443, and of that case said: "But we held in Railroad Co., &c. v. The People, that the first section of this statute should be construed in connection with the eighth, and that the latter section, by providing for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each of the railroad corporations in the State, furnished a uniform rule for the guidance of the railroad companies. In that case we said: 'When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed.' "

As this Illinois section appears to have been substantially reenacted here without, however, accompanying it with the provision for a standard, we quote the more freely from the Illinois court construing the section.

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In the 77 Illinois case the court said: "That section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad in this state of uncertainty and danger and exposed to such seeming injustice. . . . The eighth section provides how reasonable rates shall be ascertained; what they shall be; that the railroad and warehouse commissioners should make for each of the railroad corporations in the State a schedule of reasonable maximum rates, thus furnishing a uniform rule for the guidance of the railroad companies."

These authorities and the argument abundantly supporting them are sufficient. Other objections to the judgment below need not be discussed, as the one noted is fatal, and the statute can not be enforced as a penal statute.

It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its

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charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law.

The judgment is reversed, with directions to dismiss the indictment.

CASE 24—PETITION EQUITY—APRIL 4.

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Schmidt v. Louisville, Cincinnati & Lexington Railway Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. JUDGMENT—PARTIES TO ACTION.—Where one takes charge of the defense to an action, controls it, employs counsel, produces evidence, and pays the expenses of the nominal defendant to the suit, he is bound by the judgment in the action, although the record does not show him to be a party thereto.
2. PRACTICE.—In such a case, the proper method of enforcing the judgment against such an one who is not a party of record to the suit, would be to institute a separate suit setting up these facts, or by rule in the original suit, based upon an affidavit containing the facts.

SIMRALL, BODLEY & DOOLAN AND PIRTLE & TRABUE FOR APPELLANTS.

1. The order of the lower court refusing to permit appellants' amended petition seeking to make the L. & N. R. Co. a party defendant to the action, was a final order from which an appeal may be prosecuted. (Berry v. Hamilton, 1 Bush, 361, 91 Ky., 258.)
2. A lien created by mortgage on earnings may be enforced in the

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hands of the mortgagor's vendee. (Rutten v. U. P. R. Co., 17 Fed. Rep., 480.)

3. Where a person actually interested in the subject-matter (*a fortiori* where he is the only person interested), prosecutes or defends an action in the name of another, exercising control, introducing witnesses, employing counsel, and doing those things which a party to an action does, he is bound by the judgment, *although never appearing of record.* (Freeman on Judgments, sec. 174; Bennett v. Wilmington Star Mining Co., 18 Ill. App., 17; Cole v. Favorite, 69 Ill., 457; Estell v. Peacock, 48 Mich., 471; Valentine v. Mahoney, 37 Cal.; Stoddart v. Thompson, 31 Ia.; Landes v. Hamilton, 77 Mo.; Wood v. Ensel, 63 Mo., 193; Linton v. Harris, 78 Ga., 265; 74 Wis., 474; Claflin v. Fletcher, 7 Fed. Rep., 851; Eagle Co. v. David Bradley Co., 50 Fed. Rep.,193; Same v. Same, 57 Fed. Rep., 981; Amer. Bell Tel. Co. v. Nat., &c., Tel. Co., 27 Fed. Rep., 666; Lovejoy v. Murray, 3 Wall., 1; Robbins v. Chicago, 4 Wall., 657; Warfield v. Davis, 14 B. Mon., 41; L. & N. R. Co. v. Hall, 12 Bush; Heckman's Adm'r v. L. & N. R. Co., 85 Ky., 631.)

HELM & BRUCE FOR APPELLEES.

1. As against the L., C. & L. Ry. Co. no right of appeal lies, because appellant already has his judgment against it, and the same has been affirmed by this court, and is at an end. (Meadows v. Goff, 90 Ky., 541; Brown v. Vancleave, 86 Ky., 381.)
2. A new party can not be brought into a suit except by a pleading, and since the pleading was not filed, it is obvious that the L. & N. R. Co. is no party to the record, and can not be made so by the clerk issuing process against it.
3. This is not a case where one party, the real party in interest, defends the suit in the name of another. The fact that the suit was defended by counsel who represent the L. & N. R. Co., and the fact that the same man was president of both companies, should not operate to bind by a judgment one who was not a party to the suit in which it was rendered.

JUDGE DuRELLE DELIVERED THE OPINION OF THE COURT.

The appellant, Schmidt, over ten years ago, as trustee under the mortgage executed by the northern division of the Cumberland & Ohio Railroad Co., brought suit against the Louisville, Cincinnati & Lexington Railway Co. upon a

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contract of lease between the Cumberland & Ohio Railroad Co. and the Louisville, Cincinnati & Lexington Railway Co., whereby the former company leased its railroad to the latter for thirty years, and the latter company, in the event that the net earnings of the leased road were insufficient to pay the interest and provide a sinking fund for the payment of the mortgage bonds issued by the Cumberland & Ohio Railroad Co., undertook to supply the deficiency by applying to the purpose so much as might be necessary of the net earnings of its own lines, earned from business coming to it from or over the lines of the Cumberland & Ohio Railroad Co.

The facts of the case are fully stated in the opinion of this court upon the former appeal by Schmidt, trustee, against Louisville, Cincinnati and Lexington Railway Co., reported in 95 Kentucky, 289, but by some mistake, entitled in the report "Schmidt, trustee v. Louisville & Nashville Railroad Co." For the facts up to the date of the former appeal it is unnecessary to do more than refer to that opinion.

After the reversal of the case on that appeal an order was duly entered in accordance with the opinion, requiring the Louisville, Cincinnati & Lexington Railway Co. to pay into court the sum of $53,565.62, with interest, on or before June 11, 1894, and a rule was awarded against the company to pay in that sum and interest. To this rule the company filed a response, stating "that in 1881 it sold and conveyed for a consideration paid at the time, all its property, rights, privileges and franchises, except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply

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with the order of this court, and it is, therefore, unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it."

Another rule was awarded against the company to report the amount of its net earnings on business coming to it from or over the Cumberland & Ohio railroad since the date of the last net earnings reported by the commissioner's report, which was confirmed in accordance with the opinion of this court on the former appeal. In response to this rule the company said that "it has not made any net earnings, or earnings of any kind, since the date aforesaid (the time of the net earnings reported in report "R. E. S. No. 2"), on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind since it does not own any railroad or property of any character whatever, and has not since the date aforesaid."

Motions to strike these responses from the files and to make them more specific were overruled. Thereupon the plaintiff filed a reply to the responses, denying the statements contained in them and averring that the Louisville, Cincinnati & Lexington Railway Co. had never made any legal or other sale of its railroad or property, and that the road had been continuously operated in the name of said defendant. Subsequently the plaintiff asked leave to withdraw the reply to the responses of the Louisville, Cincinnati & Lexington Railway Co., and moved to file an amended and supplemental petition making the Louisville & Nashville Railroad Co. a party defendant.

The amendment tendered sets out the execution and terms of the lease, contract and mortgage relied on in the previous litigation, avers default in the payment of interest on the bonds in 1886 and subsequently, and charges that net earn-

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ings of the Cumberland & Ohio Railroad came into the hands of the Louisville, Cincinnati & Lexington Railway Co., which were not applied to the payment of interest, and that all the sources of the Cumberland & Ohio Railroad for raising money having failed to provide sufficient funds to pay interest on the bonds, it was necessary to appropriate to that purpose the net earnings of the Louisville, Cincinnati & Lexington Railway Co. arising out of business coming to it from or over the lines of the Cumberland & Ohio.

It further alleges that in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that by that deed the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co. the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads of both the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincinnati & Lexington Railway Co., that the Louisville & Nashville Co., not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in acccordance therewith

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until April, 1883, and knew that the earnings referred to were made on the operations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; that the Louisville & Nashville Co. filed an answer herein in the name of the Louisville, Cincinnati & Lexington Co., employed counsel to make defense, and has controlled the defense in this case from the time of service of process. The amendment further avers that until the responses to the rules herein were filed the plaintiffs did not know of the control by the Louisville & Nashville Co. over the roads of the other two companies, and that it was plaintiffs' intention in bringing this suit to sue the company or companies operating these roads, and which had made the earnings referred to.

The prayer is that the Louisville & Nashville Railroad Co. be made a party defendant for judgment against it, for the subjection of the earnings made on these roads, in accordance with the terms of the lease and mortgage, to the payment of the mortgage debt, and inasmuch as the Louisville & Nashville Railroad Co. has made the defense in this suit, and after judgment has attempted to thwart the collection thereof, that a receiver be appointed to take charge of and operate the properties acquired by the sale, and to apply the earnings according to the judgment of this court.

The motions to withdraw the reply to the responses and to file this amendment were overruled by the lower court, and from that judgment this appeal has been taken.

It is earnestly contended by counsel for appellants that the rule laid down in Heckman v. Louisville & Nashville Railroad Co., 85 Ky., 638, following and amplifying the doctrine announced in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, applies to this case and is decisive

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of it. Appellants claim that the Louisville & Nashville Railroad Co. was the real defendant in this case, made the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and is bound by the judgment.

This appeal, therefore, presents two questions for decision. First, whether, upon the facts alleged in the amended petition and disclosed by the record, the Louisville & Nashville Railroad Co., is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellants' claim.

Upon the first question there is little difficulty. Assuming the statements of the amended petition to be true (and for the purposes of this appeal we must so presume), together with the facts disclosed by the record, it appears that the Louisville, Cincinnati & Lexington Co. had no railroad, property or means to conduct a defense; that it had only the franchise to exist, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant in the suit. The record discloses that Mr. R. E. Sewell, who made the report upon which the judgment was based, made affidavit "that as the auditor of the Louisville & Nashville Railroad Co., he superintends all work of a similar kind of the Louisville, Cincinnati & Lexington Railway Co., defendant herein, and all like statements rendered herein heretofore by said defendant have been made under his superintendency."

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Numerous reports were filed in response to rules taken against the Louisville, Cincinnati & Lexington Railway Co. by the officials, who were also officials of the Louisville & Nashville Railroad Co., stating earnings as having accrued to the Louisville, Cincinnati & Lexington Railway Co. from business coming to it from or over the lines of the Cumberland & Ohio.

In our opinion the law is well settled that if the statements of the amendment tendered are true the Louisville & Nashville Railroad Co. is bound by the judgment against the Louisville, Cincinnati & Lexington Railway Co., and in any litigation between the Louisville & Nashville Co. and the plaintiffs in this suit the record of this suit might be introduced, with evidence showing the truth of the averments of the amended petition.

In the case of Louisville & Nashville Railroad Co. v. Hall the company was sued by the wrong name, and it was held that, as the company failed to plead further and failed to disclose its true corporate name, it could not complain that the judgment was rendered against it in the name by which it had been sued.

In the case of Heckman v. Louisville & Nashville Railroad Co., 85 Ky., 638, a suit was brought against the Louisville, Cincinnati & Lexington Railway Co. for an injury which was inflicted by the Louisville & Nashville Railroad Co. After a period of more than one year from the date of the injury an amended petition was filed, stating that by mistake the defendant was styled the Louisville, Cincinnati & Lexington Railway Co., when it should and was intended to be the Louisville & Nashville Railroad Co., which was the correct name of the defendant sued and intended to be sued in the action, and praying that the defendant be

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required to defend by its correct name of the Louisville & Nashville Railroad Co., and for judgment against it.

In that case the court held that the Louisville & Nashville Railroad Co. had entered its appearance and made defense to the action within one year from the date of the injury, and therefore the statute of limitation could not apply, though, in fact, the only answer filed up to that time was in the name of the Louisville, Cincinnati & Lexington Railway Co.

The court in that case said: "In our opinion, not only according to unvarying authority on the subject, but on the principle of estoppel and common fairness, when a party enters his appearance and makes his defense to an action he can not afterward complain of the judgment that may be rendered against him upon the ground that he was sued by the wrong name, or what is practically the same thing, that the name of a different person was inserted in the caption of the petition and in the summons; and it, therefore, necessarily follows that the action must be regarded as commenced and actually pending against him, at least from the time he so enters his appearance, if not from the time he is served with the summons."

In the case of Eagle, &c., Co. v. Bradley, &c., Co., 50 Federal Rep., 193, suit was brought for an infringement of a patent, not against the firm which manufactured the articles, but against a branch of that firm. The firm which manufactured the articles conducted the defense and was defeated, and the decree in that case was held binding upon the firm which conducted the defense. Judge Blodgett, in delivering the opinion, cited Robbins v. Chicago, 4 Wallace, 657; Claflin v. Fletcher, 7 Federal Rep., 851, and said: "The conclusive effect of judgments respecting the same

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cause of action and between the same parties rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. . . . Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make a defense, control the proceedings, examine and cross examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit v. Morgan, 7 Wall., 619; Miller v. Liggett, &c., Co., 7 Federal Rep., 91; Claflin v. Fletcher, *Id.* 851; American Bell Tel. Co. v. National Imp. Tel. Co., 27 Federal Rep., 666; Morse v. Knapp, 37 Federal Rep., 352; Lea v. Deakin, 11 Biss., 23; 13 Federal Rep., 514; Wilson's executors v. Deen, 121 U. S., 525; 7 Sup. Ct. Rep., 1004.

"The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case made itself the *dominus litis* in that case; it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found, and may, I think, with entire propriety be held to be bound, not only upon all questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case. The Hague patent itself was considered by the Iowa court, and not held to be an anticipation or protection as against the complainant's patents. The defendants may, I think, be considered as bound, but all which it could have appropriately put into the record in that case, including the testimony, which it is claimed would carry the Hague invention back of the Wright invention.

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"I am, therefore, of opinion that all the defenses which are urged here have been anticipated and are cut off by the decree in the Iowa case. A decree will, therefore, be entered, finding that the defendant infringed as charged, and for an injunction and accounting."

The judgment in that case was affirmed by the Court of Appeals, 7th Circuit, 57 Federal Rep., 981.

The court said: "The suit in the Circuit Court of the United States for the southern district of Iowa was brought to restrain the infringement of the same claims of the same patent here in question. The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant was, in fact, the real party to that litigation, and, so far as the decree there is *res adjudicata*, is as effectively concluded thereby as if it were the actual defendant to the record. (Lovejoy v. Murray, 3 Wall., 1, 18, 19; Robbins v. Chicago, 4 Wall., 657, 672.)"

In Landes v. Hamilton, 77 Mo., 565, the court said: "It is not always essential to the creation of an estoppel that the person should be a party to the record, but one who thus instigates and promotes the litigation for his benefit by employing counsel, binding himself for costs and damages, will be bound by the litigation or procedure as much as the party to the record."

In Estell v. Peacock, 48 Mich., 471, an action was instituted on a note given plaintiff by defendant for logs. A stranger, who had licensed plaintiff to cut logs, but had undertaken to revoke the license before plaintiff sold the logs and accepted the note, notified the defendant not to pay plaintiff the amount of the note, whereupon defendant

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permitted the stranger to defend the action in defendant's name. It was held, Judge Cooley delivering the opinion, that the stranger was bound by the judgment, although not a party.

In Bennett v. Wilmington Star Mining Co., 18, Ill. App., 17, the court citing Cole v. Favorite, 69 Ill., 457, announced the principle: "Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person fall within this category, and in such cases parol evidence is admissible to show who are the real parties in interest, and that they conducted the litigation in the name of other parties."

In Valentine v. Mahoney, 37 Cal., 389, plaintiff brought suit in ejectment. Defendant introduced the record of a suit between himself and the tenant of plaintiff's grantor, in which the grantor, being the landlord, defended the suit in the tenant's name. It was held that the landlord, plaintiff's grantor, was bound by the judgment in the suit between the tenant and the present defendant, although not a party, because he conducted the defense, and that the plaintiff took subject to the infirmities of his grantor's title.

The court, holding the record admissible, said: "Would it not be an anomaly in practice to permit a person, after defending an action upon a particular issue, and immediately thereafter, to litigate the same matter in another action with the same adversary in total disregard of the judgment in the former action? The judgment is conclusive, both upon the landlord and tenant, in the subsequent action between them, involving the issue of eviction of the tenant by virtue of the judgment."

In Stoddart v. Thompson, 31 Iowa, 801, the court said: "One who, though not a party, defends or prosecutes an

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action by employing counsel, paying costs, and doing those things which are usually done by a party, will be bound by the judgment rendered therein."

To the same effect see also Palmer v. Hayes, 112 Ind., 292; Wood v. Ensel, 63 Mo., 193; Strong v. Phoenix Ins. Co., 62 Mo., 289; Cole v. Favorite, 69 Ill., 457; Linton v. Harris, 78 Ga., 265; Lovejoy v. Murray, 3 Wall., 1; Warfield v. Davis, 14 B. M. 41, Freeman on Judgments, sections 174 and 175.

Upon the second question, whether the procedure adopted is correct, appellee's counsel rely principally upon the cases of Brown v. Vancleave, 86 Ky., 381, and Meadows v. Goff, 90 Ky., 541.

In the former case the actual question decided was that after a judgment in favor of the plaintiff, and the receipt by him of the amount of the judgment in satisfaction thereof, his demand was satisfied and his right to appeal barred.

In the latter case this court held that after a final judgment settling a controversy between two litigants it was too late for a third person to file a petition to be made a party to the suit and set up a claim to the property in controversy.

Neither of these cases seem to apply directly to the case at bar. But we are of opinion that after the appeal and judgment in this case it would be too late to bring into this litigation one who was neither a party to the record nor bound by the judgment. In our view the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for upon the theory of that amendment, and considering the facts therein stated to be true, that company was already a party defendant and bound by the judgment. The proper pro-

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cedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment.

Proceedings in this litigation were not ended by the judgment rendered after the last appeal. Undoubtedly the appellants could not only take steps to enforce the satisfaction of the judgment then rendered, but they could proceed to subject net earnings accruing to the Louisville, Cincinnati & Lexington Railway Co. (if that company had been the real defendant), since the last net earnings reported before the report "R. E. S. No. 2" was made. So, too, they may, in our judgment, proceed in this litigation to subject those earnings in the hands of the Louisville & Nashville Railroad Co., if it be, as alleged in the amended petition, the real party defendant in this suit. (Wiggins Co. v. O. & M. Ry. Co., 142 U. S., 292.)

This question, while not strictly before the court upon this appeal, has been considered and decided to the end of preventing needless litigation.

Wherefore, the judgment is affirmed.

The Court delivered the following response to a petition for modification, June 17, 1896:

The petition for modification has been carefully considered, and while it is true that the appellee, the Louisville, Cincinnati & Lexington Railway Co., has no interest in the matters in regard to which a modification of the opinion is sought by it, it is perhaps also true that the opinion went too far in stating that questions were *decided* which were

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not strictly before the court upon the appeal. It has been the custom of courts, since opinions were written, to state the existence of a remedy which was not sought as a reason for denying the remedy which was sought. In thousands of cases it has been stated that the relief sought in equity was denied because an adequate remedy at law existed. This, however, is universally considered, and properly so, to be stated *arguendo*, and the opinion in this case should have been confined in that respect to stating, as argument, that the Louisville & Nashville Railroad Co. was bound by the judgment, if the matters stated in the tendered amended petition were true, and without indicating the exact course of procedure to be adopted. To the extent herein indicated the opinion is modified.

CASE 25—PETITION ORDINARY—MARCH 25.

Louisville & Nashville Railroad Co. v. Harvey.

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APPEAL FROM WARREN CIRCUIT COURT.

1. MASTER AND SERVANT—TERM OF EMPLOYMENT.—A contract of employment between master and servant, in which there is no specified term in days and months, is one which may be terminated at will by either of the parties thereto.
2. SAME.—Where a brakeman was employed by a railroad company during a strike, and there was no specified term of employment, the company was not compelled to retain him in its service longer than the one month, if that long; and no formal discharge by the company was necessary.

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J. A. MITCHELL, WM. LINDSAY AND H.W. BRUCE FOR APPELLANT.

1. Where there is an indefinite hiring, and the service is not to continue for a certain fixed and definite time, it is determinable at the will of either party; and there is no distinction between domestic and other servants. (Wood on Master and Servant, secs. 127 and 136.)
2. One addicted to the use of intoxicating liquors should not be employed in railroading; and where a railroad company employs such an one, it is justified upon discovery of his habits, to refuse to further employ him. (Wood on Master and Servant, 2 ed., sec. 134.)
3. In such a case actual loss and damage is the criterion of recovery, and appellant's instruction based thereon should have been given. (Lewis v. Scott, 16. Law Rep., 49.)

E. W. HINES, SIMS & COVINGTON, W. T. COX AND H. B. HINES FOR APPELLEE.

1. The court properly struck out of defendant's answer that part of it alleging that plaintiff was addicted to the use of intoxicating liquors. If he was, defendant's remedy was to discharge him, and that it had never done.
2. A mere failure to pay, however long continued, is not equivalent to a discharge; and until there was some act of defendant amounting to a repudiation of the contract, it was plaintiff's duty to hold himself in readiness to perform the duties thereunder.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

L. K. Harvey brought this action to recover of the Louisville & Nashville Railroad Co. $112, amount of wages alleged to be due him as railroad brakeman for the months of August and September, 1890, at the rate of $56 per month. Subsequently he filed an amended petition asking judgment for the additional sum of $224, amount of wages at same rate for four succeeding months. And from the judgment, following a verdict of the jury for $150, defendant has appealed.

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At the trial defendant asked the court to instruct the jury peremptorily to find for it. And a refusal of that instruction involves an inquiry whether the facts stated in the petition and amended petitions constitute a cause of action.

We quote so much of the petition as is pertinent:

"Plaintiff further says that, in the month of July, 1890, the defendant employed him as a railroad freight brakeman for them; that said contract of employment was made by this plaintiff and a duly authorized agent of said defendant company; that, under said contract, it is and was the duty of this plaintiff to work for the said defendant as a railroad freight brakeman.

"Plaintiff says that the defendant agreed and promised to pay him for his said services, as set out above, the regular or usual wages allowed all men employed as freight brakemen, which was at the rate of $— per trip, making an average of $— per month.

"Plaintiff says that, for the first month of his services, to wit, the month of July, the defendant paid him the sum of $70.80, but has never paid, and now refuses to pay, him his wages, or any part thereof, for the months of August or September, although the wages for the two months just past are now overdue and have been demanded by him. Plaintiff says that he is still in the employ of defendant company under his contract with them and has never been discharged from their service, and has been at all times and is now ready, when called upon, to perform his work as the contract between him and defendant requires him to do; that defendant is justly indebted to him the sum of $112, the sum of $56 being the usual and regular wages allowed for freight brakesmen per month, which said sum, or any part thereof, the defendant has refused to pay."

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It is not stated in the petition or amended petition that plaintiff rendered any service as freight brakeman, or otherwise, for defendant during the six months, for which length of time he seeks to recover wages; on the contrary, in his reply to the answer it is admitted that he did not. Therefore, to entitle him to recover the full amount of wages during the six months, or even any part thereof, without having rendered, by his services, an equivalent, the contract, under which he claims, should fully and plainly authorize it.

It is not alleged, nor for that matter proven, that there was any contract of employment for any specified term of days or months. On the contrary, the statement in the petition that defendant was to pay the regular and usual wages allowed men employed as freight brakemen, which was $56 per month, can not be interpreted otherwise than as an employment indefinite as to time during which the relation of master and servant would exist, and consequently, as is well settled, subject to termination at the will of either. For it is not stated in the petition that, by the terms of the contract, plaintiff agreed to work or defendant agreed to employ him as freight brakeman for any specified or fixed term of months or days.

And, if there was any doubt of such being the true meaning of the contract, the proof would remove it. For it appears that plaintiff and others, being at Bowling Green, out of employment, was hired to go to Newport, Ky., to supply places of striking brakemen, where he was employed a few days only and then returned to Bowling Green at the expense of defendant, and, though he rendered no further service, was paid about $70 for the month of July, being allowed $5 per day while in active service at Newport.

It seems to us too plain for discussion that the parties

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understood that plaintiff was not bound to continue longer in the service of defendant, and, necessarily, the latter was not bound to employ him longer than the month of July, if even so long. And so no formal discharge of plainitff was necessary. But if it had been, the answer of defendant's agent to the application of plaintiff for employment, that he would inform or call on him when his services were needed, was an indication too plain to be misunderstood that plaintiff was free to seek employment elsewhere, and defendant was free to dispense with his services thereafter.

It seems to us wholly unreasonable and without the usual course of such business that plaintiff regarded himself, in virtue of the alleged contract, the employee of defendant after July, and therefore, though rendering no service, entitled to full wages, or that the latter understood itself bound thereby to keep him on its pay rolls after that month.

In our opinion defendant was entitled to the peremptory instruction, and for the error of the court in refusing to give it the judgment is reversed for a new trial consistent with this opinion.

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APRIL TERM, 1896.

CASE 26—INDICTMENT—APRIL 15.

Commonwealth v. Drain, et. al.

APPEAL FROM GRAYSON CIRCUIT COURT.

1. PROTECTION TO FISH—SPECIAL LEGISLATION.—Section 1899 of the Kentucky Statutes providing for the protection of fish in this State, and the succeeding sections providing how the fines in such cases shall be disposed of, and giving exclusive jurisdiction thereof to the circuit courts is not "special legislation" within the meaning of the prohibitory clause of the Constitution.
2. INTERIOR COUNTY—JUDICIAL NOTICE.—The courts will take judicial notice of the fact that a county is an interior county, and can consequently have no stream within its limits "forming the boundary line between this and other States." And besides, it is doubtful, if the exception provided for in the statute is not merely a matter of defense.

W. S. TAYLOR FOR APPELLANT.

1. The law against seining applies to all persons and all counties alike, and is, therefore, not special legislation. (17 Ky. Law Rep., 277; Am. & Eng. Enc. of Law, vol. 8, p. 34; Hooker v. Cummings, 20 Johns (N. Y.), 90.)

J. S. WORTHAM FOR APPELLEES.

1. The fish law of March 19, 1894, is unconstitutional and void:
(a.) Because it is special legislation which is prohibited; and
(b) Because it is vicious and dangerous legislation to offer to the informer or officer securing the apprehension and conviction, a portion of the fine.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The indictment charges the appellees with unlawfully catching fish by means of a seine in Rough Creek, a running stream in Grayson county, and a demurrer having been sustained thereto, the State has appealed.

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The provisions of the statute involved are as follows:

"Section 1899. That it shall be unlawful for any person or persons to catch or destroy fish in any of the running waters, lakes or ponds, other than private ponds, of this State, by means of a seine, net, other than a dip-net, drag or trap, except streams forming the boundary line between this and other States. Any one thus offending shall, on conviction, be fined in a sum not less than $25 nor more than $50 for each offense, and cost of prosecution."

By succeeding sections sixty *per centum* of the fines imposed under this law is to be paid into the county treasury where the offense is committed, and forty *per centum* is to go to the civil officer securing the apprehension and conviction of the offender, and the circuit courts of the respective counties are given exclusive jurisdiction to indict and punish.

It is said that the ground on which the demurrer was sustained is that the provisions respecting the disposition of fines and conferring exclusive jurisdiction on circuit courts render the law obnoxious as special legislation, and this is expressly prohibited by the Constitution. That instrument does prohibit special legislation providing for the protection of game and fish, but manifestly this was to remedy the common evil then prevalent of having laws on this subject in force in some localities and not in others. We think the statute a general one, and in no sense special or local within the meaning of the prohibitory clause of the Constitution. No authority is cited for the position assumed by counsel, but it is argued that a law offering a reward for informers is an encouragement to the spy, etc. If this is true, it is a matter for the consideration of the legislative department alone. The courts can only construe

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the statute, and can not judge of its wisdom.

It is further suggested that it is not alleged in the indictment that the stream in which the fish were caught was not one "forming the boundary line between this and other States." As Grayson is an interior county, however, a fact judicially known, it can not well have any stream within its limits forming such a boundary line; and, besides, it is quite doubtful if the exception be not a matter of defense merely.

The demurrer ought to have been overruled, and the judgment is reversed for proceedings consistent with this opinion.

CASE 27—INDICTMENT—APRIL 15.

Lindsay v. Commonwealth.

APPEAL FROM NICHOLAS CIRCUIT COURT.

1. INTOXICATING LIQUORS—SALE OF BY PHYSICIAN.—Upon the trial of an indictment for selling liquor without license, it was error to refuse to permit the defendant to show that he was a druggist, and the family physician of the person to whom the liquor was sold, and in good faith sold the liquor as an ingredient of a prescription put up by him as a medicine, at the request of such person.

HANSON KENNEDY AND CHAS. W. WOOD FOR APPELLANT.

1. Where one is a regular practicing physician and is the owner of a drug store, he has the legal right to prescribe whisky as a medicine without license to retail liquor. (Commonwealth v. Matthews, 3 Ky. Law Rep., 473.)
2. A druggist may compound his own medicine where whisky is only one of the ingredients, without license, unless he evade the law by deception or fraud. (Commonwealth v. Fowler, 17 Ky. Law Rep.)

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W. S. TAYLOR FOR APPELLEE.

1. The appellant's own testimony shows he was not acting in good faith; he does not claim that he visited the so-called patient, or investigated her condition in any way.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The defendant, Lindsay, held a license as a retail liquor dealer. He was convicted of the offense of suffering gaming on his premises, and his license adjudged forfeited.

The indictment in this case charges him with selling liquors, subsequent to the judgment forfeiting his license, to one Geo. Ockerman by the pint and half pint without a license. On the trial of the case the court excluded from the jury that part of the testimony of Ockerman tending to prove that Lindsay had been his family physician for twenty-five years; that he applied to him for medicine to relieve his wife from a severe pain in the stomach and bowels. The court also refused to allow the defendant to prove that he was a regular practicing physician, and had been for many years; that he was a druggist in good faith; that he had been Ockerman's family physician for many years; that he had often examined and prescribed for his wife; that Ockerman applied for a prescription for his wife to relieve her from a severe pain in the bowels and stomach, and that the prescription on that occasion was two ounces of syrup of ginger and fourteen ounces of whisky, and mixed the same together as a medicine and gave the same to Ockerman for his wife.

The court erred in excluding the testimony of Ockerman mentioned, and in not allowing Lindsay to prove the facts above indicated.

It was held in Commonwealth v. Hawkins, 17 Ky. Law

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Rep., 744, that "by the provisions of section 4205, Kentucky Statutes, a druggist, in his business as such, may sell 'in quantities less than a quart, for medicinal purposes only, on the prescription of a regular practicing physician,' and this he may do, in our opinion, without a license and free from any requirements or provisions of section 4203."

The same interpretation of the statute was given in Commonwealth v. Fowler, 17 Ky. Law Rep., 1209. In that case it was said: "Besides, the druggist can compound his own prescription, when whisky is only one of the ingredients, without a license, and in so doing violates no law unless in filling such prescription he is evading the law by deception or fraud in selling whisky under a fictitious prescription."

The fact that Lindsay once held a license as a retail liquor dealer did not deprive him of the right of subsequently carrying on the business of druggist and to sell liquor as a druggist for medicinal purposes in accordance with the law.

A druggist who is a regular practicing physician need not make out for himself a prescription, prescribed and filled by him as such physician and druggist for others, and preserve it as a protection from prosecution. (Commonwealth v. Matthews, 3 Ky. Law Rep., 473; Boyd v. Commonwealth, manuscript opinion, January 10, 1879.)

If the defendant, in good faith, as a physician and druggist, prescribed and sold the liquor to Ockerman for his wife he did not violate the law.

Wherefore, the judgment is reversed, with directions to grant the defendant a new trial and for further proceedings consistent with this opinion.

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CASE 28—FORFEITED BOND—APRIL 15.

Wilson v. Commonwealth.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. BAIL BOND—AUTHORITY OF CLERKS TO TAKE.—The Criminal Code confers upon clerks of circuit courts the power to take bail bonds after the expiration of the term of the circuit court during which the amount of the bail was fixed by the court; and this authority continues to and during subsequent terms of the court.
2. PLEADING—RIGHT TO AMEND.—In an action on a bail bond, where a demurrer was sustained to the defendant's answer, and he did not ask the court to permit him to amend the same, and offered no amendment containing a good defense, the court properly rendered judgment against him.

LITTLE & LITTLE FOR APPELLANT.

(No brief in record.)

WM. J. HENDRICK FOR APPELLEE.

1. After the adjournment of the term of court at which the bail was fixed by the court, the clerk of the court had the right during a subsequent called term of the court to accept the bond.
2. There is no pretense that any amendment was offered or suggested or any time asked in which to present one, and the court properly rendered judgment.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

This proceeding is to recover of the appellant, Wilson, $300 on a bail bond which was forfeited.

The record, as corrected, shows that the court made an order allowing Wm. Wilson to give bond in the sum of $300 for his appearance in the Daviess Circuit Court to answer an indictment charging him with horse-stealing. The clerk of the court accepted the bond with appellant as surety in

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the sum of $300. Counsel for appellant is in error in assuming the order of the court allowed the clerk to accept a bond only for $250. On a return of the indictment the court fixed the bail at $250. Subsequently the accused appeared in court. The Commonwealth's attorney entered a motion that the bail be fixed at $500. On consideration of that motion the court fixed it at $300.

Section 68, Criminal Code, is as follows: "The defendant, after commitment, and before the commencement of the next term of the court having jurisdiction to try the offense, may be admitted to bail in the sum fixed by the committing magistrate, by such committing magistrate or by the judge of the county court; but after the commencement of the term of the court can only be admitted to bail by the court or judge thereof. After the term, if the amount of the bail has been fixed, the bail may be taken by the clerk of the court in which the defendant is held to appear."

The bond in question was not taken after the commencement of the term and during its continuance, but the court fixed the bail. This was done at the August term, 1894. After the term, the amount of bail being fixed, the bond was taken by the clerk of the court. It appears that this was done during the following November term of the court. After the term of the circuit court wherein the bail has been fixed the Criminal Code confers authority upon the clerk of the circuit court to take the bail. We think this authority continues to and during subsequent terms of the court. The Code provides that the committing magistrate or the judge of the county court shall admit the defendant to bail before the commencement of the next term of the court having jurisdiction to try the offense. Then it provides that after the commencement of such term of the court the court or

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judge thereof can only admit the defendant to bail. If bail be fixed and not given during that term then "after the term" the clerk can take the bail, and the language does not place any limitation as to the time in which the clerk is authorized to take the bond for the amount fixed by the court.

While the court allows the order fixing bail to remain the clerk can take the bond.

Section 94, Criminal Code, provides that upon the forfeiture of a bail bond the court shall order summons to be issued against the bail, and that "no pleading shall be required on the part of the Commonwealth, but the summons shall be served, and all subsequent proceedings shall be the same as in an ordinary civil action."

The appellant filed an answer, to which the Commonwealth demurred. The court sustained the demurrer, and, as appears from the record, thereupon rendered judgment on the bail bond for the amount thereof. The record does not show the court granted or refused leave to amend, neither does it show that the appellant asked leave to amend or offered an amendment.

Section 94, Civil Code, provides: "If the court sustain the demurrer the party may amend the pleading with leave of court."

It does not require the court to offer the party to whose pleading the demurrer was sustained leave to amend. On the contrary the language implies that the party shall ask the court for such privilege. Not having asked for leave to amend, nor having offered an amendment containing a good defense, certainly the appellant can not complain because the court rendered judgment against him.

Wherefore, the judgment is affirmed.

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CASE 29—PETITION ORDINARY—APRIL 15.

Hale v. Grogan.

APPEAL FROM CALLOWAY CIRCUIT COURT.

1. PLEADING—RELEASE.—In an action against the principal in a note, the surety therein not being a party, the averments by the principal in his answer that the plaintiff owed numerous debts to the surety and the surety several to the plaintiff, without alleging there had been a settlement between them and a balance ascertained, and setting up an agreement between all the parties by which plaintiff was to apply as a credit on the note the amount due by him to the surety, formed no material issue.
2. SAME.—The plea of release was insufficient because there was no statement of facts showing any consideration for the agreement to release, or showing actual release from the obligation to pay.
3. PLEADING ACCORD AND SATISFACTION.—In order to make a plea of accord and satisfaction good, it is necessary to allege not only that the parties had agreed upon the terms of settlement, but that the agreement was executed and the satisfaction made and performed in compliance with the agreement.
4. PLEADING—PARTY TO ACTION.—It was error for the court to permit the pleadings to be encumbered with matters of account between the plaintiff and one who was not a party to the action, because they were not relevant to the issues involved and could not properly be litigated in the action.
5. ARREST OF DEFENDANT—PRACTICE.—Where a defendant is arrested upon the affidavit provided for in section 153 of the Civil Code the better practice in controverting the grounds of arrest is to do so by counter-affidavit, separate and distinct from the pleadings in the case.

FENTON SIMS FOR APPELLANT.

1. The court should have submitted to the jury in its instructions whether there was an agreement to apply as a credit on the note what appellant might owe the surety on the note as set up by appellee and denied by appellant.
2. The court in submitting the questions to the jury for a special verdict, assumed that there was such an agreement.

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3. The appellee having admitted the execution of the note and filed his plea in avoidance, the onus was on him to establish his plea by a preponderance of evidence.

W. M. REED AND W. M. SMITH FOR APPELLEE.

1. The appellant's rights were not prejudiced by the court's failure to instruct as to the agreement to apply on the note what the plaintiff owed the surety, because the court in its instructions told the jury that appellee could not be released only to the extent of payments by appellee or the surety.
2. The instruction asked by appellant were properly refused by the court because the same ideas, substantially, were embraced in the instructions given.

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The action in the court below was upon two promissory notes, one of them executed by the appellee alone, and the other by him and James A. Grogan, his surety. Both notes were executed to the mercantile firm of Hale, Head & Co., of which firm the appellant was a member. The partnership having been dissolved, the assets of the firm were divided among the individual members, and in this way the appellant became the sole owner of these notes. James A. Grogan, the surety on one of the notes, was joined with the appellee as defendant in the action, but, before the answer was filed, on motion of the plaintiff, the action as to him was dismissed without prejudice.

At the commencement of the action an affidavit of the plaintiff was filed in the clerk's office, conforming substantially with section 153 of the Civil Code, and the plaintiff, having caused bond to be executed as required in such cases, sued out an order of arrest, which was issued by the clerk, and under which the appellee was arrested, who, in due course of procedure, was bailed and released from custody.

In his answer the appellee set up in detail a number of

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debts or claims which he averred were due and owing by the appellant to James A. Grogan, the surety on one of the notes sued on, and several debts which he alleged the latter owed the appellant, and, without stating that there had been a settlement of accounts between the appellant and James A. Grogan, or that there was an ascertained balance due from the former to the latter, alleged, by way of defense to the action, that "it was agreed between said parties, N. T. Hale, J. A. Grogan and H. W. Grogan, that said Hale was to apply the amount due J. A. Grogan, as shown, to the payment of these two notes herein sued on, and was to and did then release said H. W. Grogan from the payment of said notes or any part of them, and to look alone to J. A. Grogan for the payment of same, and that all parties mentioned then agreed to said arrangement, and said defendant was released therefrom."

These allegations were specifically denied in the reply, and thus the only issue or attempted issue, on the merits of the case, was made up. But the appellee, without filing a separate affidavit controverting the grounds for the order of arrest, that were set up in the separate affidavit of appellant, controverted them in his answer to which the appellant likewise replied. Appellant also, in his reply, controverted the statements of the answer by which appellee endeavored to show the state of accounts between the appellant and James A. Grogan. And the record shows the remarkable fact that the only issues that were submitted to the jury were as to the state of accounts between the appellant and James A. Grogan, who was not a party to the action, while the jury was precluded by the instructions of the court, against the objections of appellant's counsel, from considering or passing upon any question concerning the alleged

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agreement that the appellant should look alone to James A. Grogan for the payment of the notes sued on and to release the appellee from all obligation to pay them. And the jury were required by the court to respond, by special verdict, to certain questions growing out of the alleged transactions between the appellant and James A. Grogan, upon which special findings of the jury, the court proceeded to settle their accounts, and having, in this way, ascertained that the appellant was indebted to James A. Grogan in a balance of $84.92, adjudged the notes sued on to have been fully paid off and satisfied, and dismissed the petition absolutely, and vacated the order of arrest. Exceptions were duly taken in behalf of the appellant to these proceedings, and, a motion for a new trial having been made and overruled, this appeal was prayed and granted.

Without enumerating or attempting to go into the details of the grounds for a new trial, the statement of the case thus far suffices to show that the judgment of the lower court can not be sustained. It is manifest that no material issue was formed by the pleadings concerning the causes of action set up in the petition, and upon the pleadings as they were, the appellant was entitled to a judgment for the debts sued on. The plea of release was insufficient because there was no statement of facts showing any consideration for the alleged agreement to release or showing an actual release of the appellee from all obligation to pay the notes, which were retained by the appellant, and were neither demanded by appellee nor surrendered to him after the alleged agreement was made. The facts stated in the answer, although evidently so intended, were not sufficient as a plea of accord and satisfaction. It was not sufficient to allege that the parties had agreed upon the terms of

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settlement or satisfaction of the debts sued on. It ought also to have been distinctly alleged that the agreement was executed and the satisfaction made or performed in compliance with the agreement. In other words, in order to make such a plea good, the accord as well as the satisfaction, or the delivery or performance of what is so agreed upon, must be averred. (Payne v. Barnett, 2 Mar., 314; Am & Eng. Enc. of Law, 2d edition, volume 1, page 420 ; Enc. of Pleading and Practice, volume 1, page 73; McKean v. Read, 12 Am. Dec., 13; Haggin v. Williamson, 5 Mon., 13; Peace v. Stewart, 4 J. J. Mar., 449.)

In addition to the foregoing objections to the answer, which are fatal to the defense attempted to be made, the court ought not to have permitted the pleadings to be encumbered with statements and counter-statements about the matters of account between the appellant and James A. Grogan, who was not a party to the record. These matters, in detail or in the aggregate, were not relevant to the merits of the appellant's demands against the appellee, and could not properly be litigated in the action. It was the duty of the court, upon or without motion, to compel the parties to form a material issue in the action, and to cause all redundant or irrelevant matters to be stricken from the pleadings, in order that there should be no confusion in regard to the true issues between the parties. (Civil Code, sections 114, 121.) And while we do not now hold that grounds for provisional remedies may not be set up and controverted in the pleadings, we do not regard it as being the better practice so to do; and, in this case, the grounds for the order of arrest having been stated in a separate affidavit of the plaintiff, filed at the commencement of the action, it would have been proper for the court to require

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the defendant to controvert them, if he desired so to do, by separate affidavit, instead of allowing the issues upon them to be made up in the pleadings. Such a course of procedure is evidently contemplated by the Civil Code, which provides (section 153) that the clerk of the court shall issue an order for the arrest of the defendant, either at the commencement of the action or at any time before judgment, "if an affidavit of the plaintiff be filed in his office showing" the grounds for the order. And, by section 178, it is provided that the motion to vacate an order of arrest in civil actions, or to reduce the amount of bail therein may be supported or opposed by affidavit or other evidence, and the questions arising thereon are for the court and not the jury to decide. It is the manifest object and purpose of the Code to exclude from pleadings all redundant matter or matter that is not relevant to the issues upon the merits of the cause of action or of the defense.

For the reasons indicated, the judgment of the lower court is reversed and the cause remanded, with directions to grant the appellant a new trial and to proceed consistently with this opinion.

CASE 30—INDICTMENT—APRIL 21.

Chesapeake & Ohio Railway Co. v. Commonwealth.

APPEAL FROM BOYD CIRCUIT COURT.

1. RAILROADS—FAILURE TO STOP AT CROSSING.—The fact that one railroad company operates and controls, as lessee, all trains which

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run over two lines of railroad at the point where they cross each other, does not relieve it from liability under a statute which requires all railroad trains to be brought to a full stop at least fifty feet before getting to where they cross the tracks of another railroad, and fixing a penalty for failure to do so.

WADSWORTH & COCHRAN FOR APPELLANT.

1. The indictment does not charge that the appellant operated any train over any crossing, and the agreed statement of facts does not show it.
2. The appellant had a right to operate and cross its own tracks in its own yard, and the statute does not apply to such a case.

W. S. TAYLOR FOR APPELLEE.

1. It is immaterial under the express terms of the statute that both railroads are operated by the same company.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The indictment is under a statute which reads as follows: "That whenever railroads cross each other in this State the trains shall be brought to a full stop at least fifty feet before getting to the crossing: *Provided however*, that the provision of this act shall not be applicable where the crossing of such roads are regulated by derailing switches or other safety appliances which prevent collisions at crossings nor when a flagman or watchman is stationed at such crossings and signals that the trains may cross in safety."

On a former appeal of this case this court held the indictment was good.

The Elizabethtown, Lexington & Big Sandy Railroad Co. owns a line of railway running east and west through Catlettsburg, Ky. The Ohio & Big Sandy Railroad Co. also owns a line of railway running east and west through the same town. These roads are leased by the Chesapeake & Ohio Railway Co., which operates freight and passenger trains

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on both lines of railroad, and at a point about fifty yards west of the freight and passenger station in Catlettsburg the two lines of railroad track intersect and cross each other. There is no derailing switch or other safety appliance to prevent a collision at the crossing, nor is there a flagman or watchman stationed at the crossing or signals that the trains may cross in safety. The defendant failed to bring its east-bound passenger and freight trains operated by it on and over the railroad tracks to a full stop at a point at least fifty feet before getting to point of intersection and crossing of the tracks.

It is contended there was no violation of the statute because the Chesapeake & Ohio Railway Co., as lessee of both roads, operated all the trains which were run over them. As a matter of fact no trains are operated by the Elizabethtown, Lexington & Big Sandy Railroad Co. or the Ohio & Big Sandy Railroad Co. over their respective tracks. They are exclusively used by the Chesapeake & Ohio Railway Co.

The statute was intended, in so far as possible, to prevent collisions at points where railroads cross each other. It is a fact that the railroads cross each other in Catlettsburg. Trains are operated by defendant over each of such railroad tracks and pass over the crossing in question.

While we recognize the danger of collision is greatly lessened by the defendant operating the trains which pass over the crossing, yet this does not alter the fact that trains which pass over the Ohio & Big Sandy Railroad Co. track and those which pass over the Elizabethtown, Lexington & Big Sandy Railroad Co. track pass over the crossing and a collision is possible unless safety is secured by the observance of the provision of the statute.

The judgment is affirmed.

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CASE 31—PETITION EQUITY AND PETITION ORDINARY—APRIL 21.

Hill v. Rudd.
Shircliff v. Same.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. CONTRACT—CANCELLATION OF LEASE.—Where one of several lessors who had agreed to buy groceries to a certain amount from the lessee as an inducement to his leasing the property, failed to comply with agreement, it is not a good ground for the cancellation of the lease.
2. SAME.—Where it is provided in a lease that the premises are not to be sublet without the written consent of the lessors, the fact that they will not give such consent is not ground for the cancellation of the lease.
3. ACTION FOR RENT—SUBLETTING.—Where a lease provides that the premises are not to be sublet without the written consent of the lessors, it is no defense to an action on the lease for rent, that they refused to agree in writing that the premises might be sublet.
4. PRACTICE—OBJECTIONS WAIVED.—Where one brings a suit "as agent" without disclosing the nature of his agency and for whom he is acting, and the defendant neither files special demurrer nor objects to the same in his answer, all objections thereto are waived.

HILL & HILL FOR APPELLANTS.

1. A receiver, trustee or other like fiduciary, should allege both in the caption and in the body of the petition the character in which he sues. (Newman on Pleadings, p. 291.)
2. A covenant in a lease not to assign the lease will not preclude the right of subletting or under-leasing; nor will a covenant in a lease not to underlease or sublet, preclude the right to assign lease. (Lynde v. Hough, 27 Barb., 415; Taylor on Landlord and Tenant, vol. 1, p. 480.)
3. When the implied covenant in the lease of quiet enjoyment is broken, the obligation to pay rent is without consideration, and the lessor can not recover. (Byard v. Garner, 68 Am. Dec., 105.)

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WILFRED CARICO FOR APPELLEE.

1. Appellee had a right to contract as to the nature of the business that should be carried on in his house, and that the house should not be sublet without his consent in writing.
2. Admitting the distinction between subletting the premises and assigning the lease, if appellant had the right to assign the lease then appellee's threat of litigation would have been fruitless, and, consequently, could have furnished no grounds for the cancellation of the lease.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

These cases are heard together, but they are not consolidated, and were heard in the court below.

Wm. Rudd, agent, leased to Shircliff a business house in Owensboro, Ky., for a period of three years, for the sum of $500 per annum, payable in monthly installments. The appellant, R. G. Hill, signed the contract of lease as Shircliff's surety. After occupying the house for a few months as a grocery store Shircliff was unable to carry on the business, and made a contract with others by which he sublet the house for a grocery store. By the terms of the lease he was not authorized to "under-lease the property without the written consent of the said Rudd."

Shircliff brought the action against Wm. Rudd and others to cancel the lease because, as he alleges, Wm. Rudd in leasing the property was acting for "J. C. Rudd, his wife and children, who are the owners of the storehouse rented to the plaintiff," and that in order to "induce the plaintiff to rent said house the defendant, *J. C. Rudd, promised and agreed* to purchase groceries, etc., from the store of this plaintiff" which would amount to $100 per month; that the purchase of groceries from the store amounted to about $8 during a period of five months.

It is further alleged that Wm. Rudd's refusal to give his

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written consent to the subletting of the property was "an unlawful abuse of the provisions of said contract requiring said defendant (Wm. Rudd's), written consent to a subletting" of the property; that by reason of the facts alleged he had been damaged $300 and released from the obligations of the lease.

The allegations of the petition are taken as true on demurrer. Wm. Rudd was acting as agent for J. C. Rudd, his wife and children. If, as such agent, he had agreed to buy certain groceries from the plaintiff, his failure to do so would not have been ground for cancelling the lease. That, however, is not the state of case presented by the petition. It is alleged that J. C. Rudd, in order to induce plaintiff to rent the storehouse, agreed to purchase the groceries. J. C. Rudd's contract to purchase groceries could not affect the rights of J. C. Rudd's wife and children, for whose benefit in part the contract of lease was made, as they were part owners of the property.

Plaintiff can not in law complain that Wm. Rudd did not give written consent to the subletting of the premises, because by the contract he retained control of the matter of subletting by providing it could only be done by his written consent.

The court did not err in sustaining the demurrer to the petition of Shircliff.

Wm. Rudd, agent, brought suit against Hill as Shircliff's surety for certain months' rent of the storehouse. The lease says have rented of "Wm. M. Rudd, agent, store, building," etc. It does not state for whom he is acting as agent. In the caption of the petition the plaintiff is "Wm. M. Rudd, agent," but the petition does not disclose the names of the parties for whom he is acting as agent.

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A general demurrer was filed to the petition but was never acted upon. An answer was filed. No special demurrer was filed to the petition, neither did the answer make any objection to it. If any objections could have been made by a special demurrer or by the answer they were waived. A general demurrer was sustained to the answer. The answer simply seeks to avoid a recovery by alleging that the parties to whom Shircliff sublet the premises would not take it, because Rudd would not give his consent thereto in writing, and the threat of litigation in the event it was sublet without such consent. The lease, as heretofore stated, provided the property could only be sublet by the written consent of Rudd. The answer presented no defense to the action.

It is not necessary to discuss the question as to the right of Shircliff to have assigned the lease without the written consent of Rudd, or the rights generally of tenants to sublet the leased premises or to assign the lease, or to state the distinction between assigning a lease and subletting the premises. Although Rudd asserted that Shircliff, under the contract, had no right to assign the lease or sublet the premises without his written consent, although his opinion was erroneous as to his right to prevent an assignment of the lease or the subletting of the premises, this would not release Hill from his liability on the contract.

The judgments are affirmed.

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CASE 32—INDICTMENT—APRIL 21.

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Commonwealth v. Heath.

APPEAL FROM WHITLEY CIRCUIT COURT.

1. LESSER CRIME—ASSAULT AND BATTERY.—Where one was indicted under section 1166 of the Kentucky Statutes for assault with intent to kill, charged to have been committed by shooting the one assaulted with a pistol, the court properly refused to instruct the jury that they might find the defendant guilty of assault and battery, although there was evidence that the prosecuting witness was struck in the head with the pistol instead of being shot.
2. SAME.—While it is true assault and battery is a lower degree of and included in the offense of assault with intent to kill, it does not follow that one indicted for the latter offense only may be convicted and punished under the same indictment for every character of assault or assault and battery, growing out of the facts upon which the indictment may have been found. The general rule is that a charge in an indictment, that an offense was committed in a particular way, or with a certain instrument or means, can not be sustained by evidence that it was committed in a different way or by different means.
3. SAME.—No one ought to be convicted of an offense of lower degeee than that charged in the indictment under which he is tried, unless the evidence would justify a conviction if he were prosecuted under the same indictment only for the lower degree of the offense.

C. W. LESTER FOR APPELLANT.

1. Any act of a defendant growing out of or being a part of the same transaction upon which the indictment was based, is included in the charge, and the defendant should come into court prepared to defend himself against every phase of the transaction. (Commonwealth v. Duncan, 91 Ky., 592.)
2. One charged with a violation of the law, by an indictment sufficiently explicit to inform him of the transaction about and for which he is to be tried, must when he admits a portion of the transaction show himself guiltless in every phase of it.

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WM. J. HENDRICK ON SAME SIDE.

1. The court should have instructed the jury under the indictment for assault with intent to kill, that they might convict the defendant of assault and battery. (Cornelison v. Commonwealth, 84 Ky., and cases there cited.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The appellee was indicted and tried in the Pulaski Circuit Court upon a charge under section 1166 of the Kentucky Statutes of willfully and maliciously shooting and wounding A. J. Beatie with a pistol with the intention to kill him.

The court instructed the jury properly under said section, and upon the right of self-defense, and also gave an instruction under section 1242 of the Kentucky Statutes with regard to unlawful shooting and wounding in sudden affray, or sudden heat and passion, without previous malice, after which the attorney for the Commonwealth requested the court to give the jury the following additional instruction, viz.: "If you do not believe from the evidence beyond a reasonable doubt that the defendant shot Beatie either maliciously or in sudden affray, yet if you believe from the evidence beyond a reasonable doubt that in Pulaski county and within one year before the finding of the indictment the defendant, not in necessary or to him reasonably apparently necessary self-defense, *struck Beatie with a pistol*, you should find him guilty of an assault and battery, and fix his punishment at a fine in any sum in your discretion, or at imprisonment in the county jail for any period of time in your discretion. You may both so fine and imprison, or either, in your discretion."

The court refused this request, to which the attorney for the Commonwealth excepted. The jury acquitted the

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appellee, and the case is brought before us by the attorney for the Commonwealth for the purpose of having the action of the lower court in refusing the request reviewed by this court, and the question is raised by counsel for the Commonwealth whether or not a person can be convicted under an indictment for the offense charged in the indictment in this case "of *every character* of assault or assault and battery that may grow out of the transaction" which we are asked to decide.

As we have stated, the charge in the indictment is that the appellee willfully and maliciously *shot and wounded Beatie with a pistol* with the intention to kill him. The evidence established the fact that the accused, on the occasion of the difficulty with Beatie, had a pistol, and that the pistol in some way was fired or exploded while in his hand, and that Beatie *was wounded* in the back of his head by *a ball from the pistol*. But the testimony of disinterested witnesses who were present did not show conclusively that the accused intentionally fired the pistol. Beatie testified that the accused "drew his pistol and fired as I was trying to get over the counter," and that he was "shot in the back of the head." The accused, however, testified *that he struck Beatie with the pistol* on the back of the head, and that the pistol fired as he struck him, but that he did not intentionally fire it. But whether the pistol was fired by the accused intentionally or not, as already stated, it was conclusively proved by uncontradicted testimony, including that of the physician who attended on Beatie, that the wound on Beatie's head *was produced by a ball from the pistol* in the hands of the accused, and then and there fired or exploded, *and not by the blow* delivered by the accused with the pistol on the back of Beatie's head. And this, in respect to the cause of the

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wound, or the manner in which it was inflicted, is as it was alleged in the indictment. We are of the opinion that under the charge as laid in the indictment, and upon the evidence in the case, the court properly refused the request of the Commonwealth's attorney. After the instructions we have noted were given to the jury, the court was requested to say to the jury in effect that if the accused *unlawfully assaulted and struck* Beatie with a pistol they might find him guilty under this indictment of the offense of assault and battery and punish him accordingly. Undoubtedly the offense of assault and battery is a lower degree of or included in the offense charged in the indictment. (Commonwealth v. Duncan, 91 Ky., 592; Criminal Code, sections 262 and 263.

Still it does not follow, as claimed by the learned counsel, that one charged and prosecuted on an indictment for the latter offense only may be convicted and punished under the same indictment for "*every character* of assault or assault and battery" growing out of the facts upon which the indictment may have been found or the charge based. The general rule is that a charge or statement in an indictment that an offense was committed in a particular way, or with a certain specified instrument or means, can not be sustained by proof that it was committed in an entirely different way or by some means or instrument wholly unlike those stated or specified in the indictment. Proof that a murder was committed by stabbing the victim would not sustain or be relevant to a charge that it was committed by administering poison. And a charge, as in this case, of willful and malicious wounding *by shooting*, would not be supported by proof that the wounding was done *by striking* with a pistol, a rock or a bludgeon in the hands of the perpetrator. (Whar-

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ton's Criminal Law, ninth edition, sections 519-20; Guedel v. People, 43 Ill., 226.)

In the last named case the court said: "We must hold that homicide by shooting and homicide by beating upon the head with a gun held in the hands are modes of causing death so essentially unlike that the proof of one mode would be inadmissible under an indictment charging the other." A proper and just application of the sound principles of law upon which this rule is based, in our opinion, requires that conviction, in cases of this kind, for offenses of lower degree than such as are charged, and where the evidence fails to establish guilt of the offenses charged should follow, if at all, only in cases in which the evidence shows that the offenses of lower degree were committed substantially in the manner stated, or with the means or instruments specified in the indictments. No one ought to be convicted of an offense of lower degree than that charged in the indictment under which he is tried unless the evidence would justify a conviction if he were prosecuted under the same indictment only for the lower degree of such offense. Whether the evidence would justify a conviction in such a case would generally depend largely, if not wholly, upon its correspondence with the allegations of the indictment as to the means or instrument with which the punishable act was committed.

This correspondence, however, is not so essential in cases wherein the evidence establishes only an assault which is included in all crimes of violence to the person without regard to the instrument or means used to effectuate the criminal intent of the assailant. (Am. and Eng. Enc. of Law, volume 1, page 778; Wharton's Cr. Pl. and Pr., eighth edition, section 159.)

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The rule laid down is a safe one, and its application to each particular case as it arises will not be difficult in a wise administration of the criminal and penal laws of the Commonwealth. The learned judge of the lower court, it seems, acted upon it in refusing to give the instruction in question. It is quite in harmony with the principles of law laid down by the best text writers on criminal law and procedure, and in numerous adjudged cases in this State, to which we refer. (Criminal Code, sections 122 and 124; Wharton's Criminal Law, ninth edition, volume 1, sections 27, 576, 641, 644 645*d*; Bishop's Criminal Law, seventh edition, chapter 53, sections 788, 804, *et seq.*; Commonwealth v. Magowan, 1 Met., 368; Commonwealth v. Perigo, 3 Met., 5; Bishop's New Criminal Procedure, fourth edition, volume 1, section 325, *et seq.*; Am. and Eng. Enc. of Law, volume 10, page 567; Erwin v. Commonwealth, 96 Ky., 422; Riggs v. Commonwealth, 17 Ky. Law Rep., 1015; Sosh v. Commonwealth, 4 Ky. Law Rep., 254. See also the case of Stephenson v. State, 25 S. W. Rep., 784.)

The rule we have laid down being in our opinion the correct rule in such cases as this, sustained by principle, and in harmony with the principles recognized in the authorities referred to, the action of the lower court in this case is affirmed, and the clerk of this court is directed to certify this opinion to the lower court as the law of the case.

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CASE 33—PETITION EQUITY—APRIL 23.

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Commonwealth v. Hardin County Court.

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APPEAL FROM HARDIN CIRCUIT COURT.

1. ENROLLED BILL—EMERGENCY CLAUSE.—A bill properly enrolled and signed by the presiding officers of the two Houses and the governor, will be presumed conclusively to have been enacted into law in the manner prescribed by the Constitution, and the courts will not inquire into the manner of its passage by reference to the journals of the Houses; and the emergency clause being a part of the enrolled bill, its validity will be determined in the same way.
2. LOCAL OPTION—ELECTION IN TOWN.—Under the provisions of the act of August 6, 1892, known as the "Local Option Law," it was proper to submit to the voters of a town the question whether liquors should be sold therein, notwithstanding the town was a part of a magisterial district in which local option was then in force under a vote authorized by a local act.
3. SAME.—And the fact that there was submitted at the same time a proposition as to whether the local option law then in force in the magisterial district should become inoperative in so far as it applied to the town which was a part of the magisterial district, does not invalidate the election on the other proposition, although the submission thereof was unauthorized.

SPRIGG & CHELF, J. H. VANMETER, HOBSON & O'MEARA AND W. J. HENDRICK FOR APPELLANT.

1. The "Local Option Law" was never passed, as required by the Constitution, and is, therefore, not a law. (World's Fair Case, 14 Ky. Law Rep., 529; Constitution, sec. 46.)
2. There was no authority of law for submitting the question as to whether the local option law of Hardin county should be inoperative *as to Elizabethtown*, and the election was therefore void. (Commonwealth v. King, 86 Ky., 436.)
3. The emergency clause of the local option law was not adopted as required by the Constitution, and the act therefore could not

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have gone into effect for ninety days after the final adjournment of the legislature, and the election in this case was held before that time, and is, therefore, void.

W. R. HAYNES FOR APPELLEE.

(No brief in the record.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

This was an action in the Hardin Circuit Court for a "writ of prohibition" against the appellees, the Hardin County Court and the county judge of said county, and to restrain the county judge from entering or spreading upon the records of said court a certificate of the canvassing board of elections of said county, showing the result of an election held in the town of Elizabethtown on the 10th day of December, 1892, upon the propositions submitted to the voters of the town "whether spirituous, vinous and malt liquors should be "sold, bartered or loaned" within the corporate limits of said town, and whether the prohibition law in force in Hardin county, Kentucky, shall become inoperative so far as it affects "the said town." The petition also sought to restrain the county judge "from granting license to sell said liquors in Elizabethtown."

These propositions were submitted to the voters of the town by the order of the county judge in pursuance of the provisions of the local option law, approved August 6, 1892 (chapter 89 of the Session Acts of 1891-2-3, page 214), and the result of the said election, as evidenced by the certificate of the canvassing board, was that a majority of the votes cast in favor of the sale, etc., of liquors in the town, and that the prohibtion law in force in Hardin county should become inoperative so far as it affected the town. On final hearing the lower court adjudged that the local

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option law of August 6, 1892, was valid; denied the writ of prohibition and dismissed the petition, and from that judgment this appeal is prosecuted.

It is earnestly and ably argued by the learned counsel of the appellant that the act of August 6, 1892, was not passed in accordance with the provisions of the Constitution, and is, therefore, invalid; but that, if the act was properly passed, the "emergency clause" was not adopted in the manner required by the Constitution, and that, therefore, the law did not go into effect until ninety days after the adjournment of the session of the Legislature at which it was passed, as provided in section 55 of the Constitution, and, consequently, was not in force when the propositions were submitted and voted on.

The same question respecting the validity of the act of August 6, 1892, was raised in the case of Lafferty, &c. v. Huffman, &c., *ante* In that case it was held that the court could not go behind the enrolled bill, and, by tracing out, in the Journals of the two Houses of the General Assembly, the legislative history of the bill, ascertain whether or not it was passed in pursuance of the provisions of the Constitution on the subject, but that on that question this court was bound by the evidence furnished by the certificates on the enrolled bill of the presiding officers of the two Houses, and the approval of the governor, that the bill had been enacted into a law in the manner prescribed by the Constitution. We adhere to the opinion in that case. There, however, no question was raised as to the validity of the "emergency clause;" but that clause is a portion of the enrolled bill as certified—a distinct section of the act as approved and promulgated—and its validity must be determined in the same way and upon the same evidence

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that the validity of the other parts or sections of the act is determined, and we hold that it became valid and effective as a part of the whole act, and that by its operation the act went into effect upon the date of its approval by the governor.

The next contention is that the act did not authorize an election in Elizabethtown to make the Hardin county prohibition law inoperative so far as it affected the town. What is known as the "Hardin County Prohibition Law" was passed on the 5th day of May, 1884 (Session Acts, 1883-4, volume 2, page 901), under which, upon the vote of the people of the whole county on the 1st Monday in August, 1884, the sale of liquor was prohibited in that county. Afterwards, by an act approved March 15, 1890 (Session Acts, 1889-90, volume 1, page 696), the question was resubmitted to the people of the county by magisterial districts, at one election, held on the 10th day of May, 1890, and the sale of liquor was by that vote prohibited in all of the districts of the county except one, including the district, as then existing, which embraced the town of Elizabethtown, and no subsequent vote was taken in any part of the county under said acts. Prohibition was, therefore, in force in the whole county, save one magisterial district, at the time the present Constitution and the act of August 6, 1892, went into effect. (Kirkpatrick v. Commonwealth, 95 Ky., 326.)

By section *one* of that act, provision was made for taking the sense of the qualified voters of any county, city, town, district or precinct on the proposition "whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or whether or not any prohibition law in force in any county, city, town, district or precinct, by virtue

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of any general or special act or acts shall become inoperative." And it was further provided in the same section that "counties, cities, *towns*, districts and precincts in which the sale, barter or loan of spirituous, vinous or malt liquors *are now prohibited*, may have a vote thereon under the provisions of this act." The contention of the learned counsel is that, under the provisions quoted from the act, the county judge had no constitutional authority to submit the question to the qualified voters of the town of Elizabethtown, whether the prohibition law of Hardin county, then in force in the magisterial district embracing the town by virtue of the vote under the act of March 15, 1890, should become inoperative in the town because the prohibition in force in the town was not effected by the voters of the town as such, but by the voters of the magisterial district. We are not prepared to say that the submission of the proposition in that form alone was authorized by section 61 of the Constitution, by which it was made the duty of the General Assembly to provide some means, by general law, "whereby the sense of the people of any *county, city, town, district or precinct* may be taken as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned *therein*, or the sale regulated." But it will be observed that the act of August 6, 1892, expressly provided for submitting the proposition relating not only to original prohibition, but also relating to then existing prohibition under "any general or special act or acts," and not only to the voters of districts, but also to the voters of precincts, *cities and towns*, without regard to whether, in the case of existing prohibition, it had been effected and made operative in city, town or precinct by the vote of the whole district or otherwise. In this case both propositions were submitted

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to and voted upon by the voters of the town at one election, and we hold that the vote on the former in favor of the sale of liquor in the town had the same effect, under the Constitution, to render prohibition, then in force in the town by virtue of the vote under the special act in the magisterial district, inoperative as if it had been voted upon alone. The coupling of the latter proposition at the election with the former did not invalidate or render ineffectual the vote upon the former, although the latter may not have been authorized by the Constitution.

We do not undertake to decide here, as the question is not before us on this record, whether or not prohibition, effected under the act of August 6, 1892, or under any other act passed in pursuance of section 61, of the Constitution, by the vote of the people of any county, or of any city or town or other subdivision of a county, as a whole, could be made inoperative in any subordinate or minor part or subdivision less than the whole of the territory in which prohibition has been so effected by the vote of the qualified voters residing in such subordinate or minor subdivision. But we hold that it is the express requirement of the Constitution that the matter of what is called local option shall be provided for by general law, under which the people of the State, acting in their local divisions and subdivisions named in the Constitution, shall have the right to regulate and settle the matter for themselves. A new order of things is provided for by the Constitution, by which it is intended eventually, by general law, to do away with all local or special laws previously enacted on the subject. And while the Constitution does not, by its own force, repeal any "local option" law in existence at the time of its adoption, it does not forbid the repeal of such laws by

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the General Assembly. On the contrary, it expressly authorizes the repeal of "local or special acts." (Constitution, section 60; Brown v. Commonwealth, 34 S. W. Rep., 12.) And in this case the vote of a majority of the qualified voters of the town of Elizabethtown voting at the election held on the 10th day of December, 1892, in favor of the sale, barter or loan of spirituous, vinous or malt liquors in the town, had the effect to render the Hardin county prohibition law inoperative within the limits of the town.

Finding no error, the judgment of the lower court is affirmed.

CASE 34—PETITION EQUITY—APRIL 23.

Richie, County Judge v. Peiper's Ex'x.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. COUNTY COURTS—TERMS.—It was the purpose and intent of the act relating to courts of justice, approved June 10, 1893, to make the terms of county courts throughout the State uniform, so far as to require that they shall be monthly; and that act had the effect to repeal an act of February 25, 1854, to establish a county court for Jefferson county, in which it was provided that a county court for that county should be held "on the first Monday in every second month;" and it also had the effect to fix the first Monday in the month as the beginning of each regular monthly term of the Jefferson County Court, as that day was fixed as the beginning of the bi-monthly terms in the act of February 25, 1854.
2. ADJOURNMENT OF COUNTY COURT.—The Jefferson County Court has the authority, under the statute, to consider and act upon any

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matter within its jurisdiction and properly before the court, upon any juridical day of any monthly term of the court; and the court may be kept open for the transaction of any such business by adjourning from day to day during the term and up to the final adjournment for the term, subject only to the exceptions contained in the statute relating to the business of special terms of the court.

CHAS. M. LINDSAY FOR APPELLANT.

1. The act of June 10, 1893, repeals the provisions of the act of February 25, 1854, regulating the practice of the Jefferson County Court.
2. Until changed by law or by an order of court, as provided by law, the Jefferson County Court must hold one term in each month, and that term must begin on the first Monday of the month.

CHAS. G. RICHIE ON SAME SIDE.

(No brief in the record.)

ALFRED SELLIGMAN FOR APPELLEE.

1. Act of the legislature of 1854, supplemented by act of June, 1893, fixes by operation of law the first Monday of every month as the first day of the term of the county court for each month, and no special order of the judge to that effect is required. (Act of General Assembly Ky., 1854; Kentucky Statutes, sec. 1058.)
2. The regular term of the county courts, unless sooner adjourned for the term, continues from the first day of the term until the first day of the succeeding term and any act which the county court can lawfully do on the first day of such a term, it can do on any day of a regular term.
3. All the calendar days of a term of the county court constitute one judicial day, and all acts relate back as if done on the first Monday of the term.

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The questions presented on this appeal are, *first*, what is a regular term of the Jefferson County Court? *second*, what constitutes the first day of such a term? and, *third*, has the county court the power to probate wills on any day other than the first day of a regualr term? These questions

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were raised in a friendly proceeding in the law and equity division of the Jefferson Circuit Court in the name of the appellee against the appellant, Charles G. Richie, judge of the Jefferson County Court, in which it was sought by the judgment of the lower court to compel and require the appellant by the proper writ to proceed and to determine the matter of the probate of the last will of William Peiper, deceased, late of said county, which had been propounded by the appellee in said court on Tuesday, the 7th day of April, 1896, but which the court, although sitting, declined to admit to probate on that day, notwithstanding the fact that the appellee was present in court and had her witness present to establish the will. The court convened regularly on Monday, the 6th day of April, 1896, the appellant, who was the regular judge of the court, sitting as such, and at the close of the business on that day, by an order duly and regularly made, the holding of the court was adjourned until the next day, when the court again convened and was opened for business pursuant to the order of adjournment. It was on that day, while the court was open for business, the appellant sitting as the regular judge, that the will was offered for probate by the appellee.

It appears that the paper offered for probate as the last will of William Peiper, deceased, had been signed and published by him in the presence of Otto C. Minor and Henry Wolks, subscribing witnesses thereto, and that when the paper was offered for probate as stated, on Tuesday, April 7, 1896, Minor was present and was sworn as a witness, and testified as to the execution of the will, and also proved the attestation of Henry Wolks, the other subscribing witness; nevertheless the court refused either to probate or reject the paper, and refused to enter any order in the matter because

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the paper was not produced and propounded on Monday, the 6th day of the month. These facts were all properly set up in detail in the petition, to which the appellee filed a general demurrer, and which the court overruled, and thereupon a judgment was entered in substance ordering the appellant to proceed in the matter of the probate of the will in question, and to hear evidence for and against it and to hear and determine the question whether or not the paper offered as such was or was not the last will of William Peiper, deceased. From that judgment this appeal is prosecuted.

By an act of the General Assembly, approved February 25, 1854, entitled "An act to establish a levy and county court for Jefferson county" (2 Stanton's Revised Statutes, edition 1860, 523), it was provided (section 4) that a county court for said county should be held "on the first Monday in every second month in the year, beginning with the first Monday in April, 1854."

It was also provided (section 10) that the regular terms of said court should begin "on the first Monday in April and every second month thereafter, and end the Saturday next preceding the first Monday of every second month," and also that the judge of the court might hold the court "*at any time* to transact its ordinary business."

It appears that this act of February 25, 1854, continued in force, without amendment affecting the terms of the court, until the passage of the act entitled "An act relating to courts of justice," approved June 10, 1893, which, among other things, regulates the jurisdiction and terms of the county courts established under the present Constitution.

Section 38 of the last-named act (Kentucky Statutes, section 1058) is as follows:

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"Section 38. There shall be a regular term of the county court held by the county judge *in each county once every month* on Monday, and, until changed as herein provided, shall be held *on the same day it now is.* The time of holding the county court in any county may be changed by an order made by the county judge and entered upon the records of the county court at the last regular term held in the year next preceding the year in which the change is to be made. Special terms of the county court may be held at any time for the transaction of any business, except probating of a will or granting tavern, liquor or druggist license, and the court may adjourn from time to time until the business is disposed of, but no adjournment shall be to a time beyond the commencement of the next regular term."

It will be observed that this section of the statute provides for both *regular* and *special* terms of the county court, established by the Constitution, *in each county* of the Commonwealth. It also provides a method for changing the time of holding the court (that is, the beginning of the term of the court in each county), excludes certain matters that are within the jurisdiction of the court from being considered and acted on at special terms, and authorizes the adjournment of a court from time to time within the period allowed for any regular term until the business is disposed of. It fixes no juridical days during the term, except the first, which must be Monday, and assigns no kind of business to any particular day, but leaves it to the judge by empowering him "to adjourn from time to time until the business is disposed of;" to sit on as many juridical days, during any one term, as the business of the court and the public interest may require, and to regulate the order of the business. Manifestly, it was the purpose and intent of this

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enactment to make the terms of the county court throughout the State uniform, so far as to require that they shall be monthly, and the effect of it was to abrogate or repeal the act of February 25, 1854, which, by virtue of the first clause of the schedule of the Constitution, was continued in force "until altered or repealed by the General Assembly." It had the further effect to fix the *first Monday* of the month as the beginning of each regular monthly term of the Jefferson County Court since that Monday in the month was the beginning of each bi-monthly term as provided in the act of February 25, 1854.

It follows from the foregoing construction of the section of the act which we have quoted at large that the county court of Jefferson county has authority under the statute to consider and act upon any matter within its jurisdiction and properly brought before the court upon any juridical day of any monthly term of the court, and that the court may be kept open for the transaction of any business within its jurisdiction by adjourning from one day of any term to any other day during the same term, and up to the final adjournment for the term, subject only to the exceptions contained in the section relating to the business of special terms of the court. Hence the fact that the will of William Peiper was not produced and offered for probate before the court on the first Monday in April, 1896, which, under the statute, was the first day of the April term of the court, was no sufficient ground or reason for not proceeding with the probate of the instrument.

This disposes of all the questions properly before us on the record of the case, and, finding no error in the judgment appealed from, it is affirmed.

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CASE 35—MOTION FOR ALLOWANCE—APRIL 25.

Power v. Fleming County.

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APPEAL FROM FLEMING CIRCUIT COURT.

1. COUNTY ATTORNEY—COLLECTION OF FINES.—Fines and costs against defendants in criminal cases which are not paid or replevied, but which are worked out at hard labor for the benefit of the county, are not "collected" within the meaning of the statute; and, consequently, the county attorney who prosecutes in those cases is not entitled to his per centum of such fines.

J. H. POWER FOR APPELLANT.

1. Appellant as county attorney is the owner of the commissions allowed him by law in the judgments against the several defendants, and to that extent is the owner of the judgments against them.
2. Appellee having coerced the payment of said judgments, including appellant's interest therein, thereby appropriated to its own use that part of said judgments belonging to appellant, and the law will imply a promise upon its part to repay the same. (Dillon on Municipal Corporations, vol. 1, sec. 460, 3d ed.; Marsh v. Fulton County, 77 U. S., 1040; Norton v. Shelby County, 118 U. S., 190; City of Louisiana v. Wood, 103 U. S., 153; Am. & Eng. Enc. of Law, vol. 4, p. 364; Gilman v. County of Costa Costa, 68 A. D., 290 and notes; Harris County v. Campbell, 2 Am. S. R., 467; City of Paducah v. Calhoun, 78 Ky., 323; Underwood v. Newport, 5 B. M., 129; Frankfort Bridge Co. v. City of Frankfort, 18 B. M., 41.)

W. G. DEARING FOR APPELLEE.

1. Before the county attorney can receive his per cent. of the fine, it must be *imposed* and *recovered*. (Gen. Stats., sec. 9, chap. 5, p. 180.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant, as county attorney of Fleming county, prosecuted in 1890, and for several succeeding years in mag-

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isterial and other courts numerous cases where judgments for fines in favor of the Commonwealth were rendered, and where the verdicts of the juries fixing the fines provided, in the language of the statute that "if the fine and costs are not immediately paid or replevied by the defendant he shall be put at hard labor in lieu of imprisonment for non-payment of the fine."

Accordingly, such of the defendants as failed to pay or replevy were "placed under the control of the jailer at hard labor for the benefit of the county" until the fine was paid. Thereupon the appellant demanded of the fiscal court of his county thirty *per centum* provided for him by statute where such fines are imposed and *collected*, contending that as the defendants had paid the judgments to the county the latter had, in effect, "collected" them, and, therefore, ought to account to him to the extent of his *per centum* therein. His claim was rejected, both in the county and in the circuit courts.

The statute in force at the time of this service provided not only that the fines should be imposed but also *collected* before the attorney could demand his *per centum*. (Section 3, of amendment of April 28, 1884, B. & F.'s G. S., edition 1888, page 182.)

We think the word "collected" is used in this statute in its ordinary sense. When the judgment is rendered the defendant may pay it immediately or replevy it and afterwards pay it, in which events, and only in which, can it be said that the fine is "collected." Besides, the service of the attorney is not rendered at the instance or request of the county. The prosecution is in behalf of the Commonwealth, and while the officer designated by law works the culprit for the benefit of the county and thus the fine due the

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Commonwealth is discharged, the county is the mere passive beneficiary and gets the advantage of the work, because the law requires it to do so, and not because it asks it or even desires it.

The "hard labor" of the defendant, on his failure to pay or replevy the fine, is a part of his punishment provided by law. Incidentally the county may be benefited under the express requirements of the law. Much clearer language must be used than is found in these various statutes before we can impose such heavy and uninvited obligations on the various counties.

The judgment dismissing the plaintiff's claim is affirmed.

CASE 36—PETITION EQUITY—APRIL 29.

Crozier, et al. v. Cundall, et al.

APPEAL FROM GARRARD CIRCUIT COURT.

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1. CONSTRUCTION OF WILL—DEFEASIBLE FEE.—A devise by a testator to two of his daughters of land "to them and their heirs, forever," in one clause of his will, but providing in a subsequent clause thereof that if either of them "should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between the rest of my children and the children of those who are dead," is a defeasible fee, and can be defeated alone by death without bodily issue.
2. RULES FOR CONSTRUING WILLS.—It is a recognized principle that in the construction of wills there can be no iron-clad rule applicable alike to all cases, but the application of all rules of construction must necessarily be varied by the language used by the testator, the object being to arrive at his intention, to be gathered from the entire will.

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3. JOINT DEVISE—SURVIVORSHIP.—Where a testator made a joint devise to two of his daughters, but providing that if either of them "should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between the rest of my children," although there was no right of survivorship as between the joint devisees, yet the death of one did not divest the other of her own interest; and the survivor takes under the will her share of the deceased sister's interest just as the other children of the testator do.

4. DEVISE—CONSTRUCTION.—The expression "the rest of my children and the children of those who are dead," means the testator's children and the descendants of his dead children *per stirpes*.

W. O. BRADLEY AND W. J. LANDRUM FOR APPELLANTS.

1. There is no repugnance in the two clauses of the will, and if there was, the last section must control. (Powell on Devises, vol. 1, p. 3; Parson on Wills, p. 33; Bouvier's Law Dic., title, Wills; Jarman on Wills, vol. 1, star p. 472; Hunt v. Johnson, 10 B. M., 352; Howard v. Howard, 4 Bush, 497.)
2. It is plain that the will, construed as a whole, conferred upon two maiden daughters a defeasible fee, which could become absolute only when these or one of them died leaving children. (Hughes v. Hughes, 12 B. M., 115; Wills v. Wills, 85 Ky., 490; Thackston v. Watson, 84 Ky., 210; Ferguson v. Thomasson, 87 Ky., 522; Wren v. Hynes, 2 Met., 129; Birney v. Richardson, 5 Dana, 424; Cornwall v. Falls City Bank, 92 Ky., 384; Sale v. Crutchfield, 8 Bush, 639; Webb v. Church Trustees, 90 Ky., 119; Holland v. Pruitt, 13 Ky. Law Rep., 868; Daniel v. Thompson, 14 B. M., 533; Gorham v. Betts, 86 Ky., 168; Deboe v. Lowen, 8 B. M,, 618.)
3. It was not the intention of the testator that in the event of the death of one of the joint devises, without issue, the survivor should forfeit her interest in the property or in the part left by the deceased sister.
4. Under the testator's will the grandchildren take *per stirpes*. (Purnell v. Culbertson, 12 Bush, 371; Lochland v. Downing, 11 B. M., 30; Hill v. Hardin, 92 Ky., 88.)

R. P. JACOBS AND WM. HERNDON FOR APPELLEES.

1. The testator's will vested an indefeasible fee in the two daughters in case they survived the testator; and the words "dying without bodily issue," had reference to the death of the devisee *before* the death of the testator. (Birney v. Richardson, 5 Dana, 482; Hughes v. Hughes, 12 B. M., 116; Wren v. Hynes, 2 Met., 129;

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Wills v. Wills, 85 Ky., 501; Ferguson v. Thompson, 87 Ky., 523; Martin v. Renaker, 10 Ky. Law Rep., 469; Trice v. Slaughter, 11 Ky. Law Rep., 678; Cornwall v. Falls City Bank, 92 Ky., 384.)

2. The language "shall revert back to and be equally divided between the rest of my children and the children of those who are dead," requires a *per capita* division. (Purnell v. Culbertson, 12 Bush, 370 and authorities there cited.)

3. The testator when he says "in the event that either one of my daughters, Patsey or Almyra, should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between the rest of my children and the children of those who are dead," can mean nothing else than that if *one* of them should die without issue, the portion devised to *both* shall be equally divided, etc.

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

This case is before us by appeal from a judgment of the Garrard Circuit Court, construing certain clauses of the last will of Abner Baker, deceased, who, being domiciled in Garrard county, died in 1861. His will was executed on the 6th day of October, 1856, and after his death his will was duly probated and admitted to record in said county. He was the father of thirteen children, ten of whom survived him, three having died before his will was made, each leaving children, of whom there were five altogether. All of his children, prior to the making of the will, had married and moved away from him, except two daughters, Almyra and Patsey, who were unmarried, the former being fifty and the latter thirty-seven years old at the date of the will. These two maiden daughters remained with him as long as he lived, and survived him many years—Patsey until December 24, 1891, and Almyra until December 14, 1893, and each of them died without ever having had issue.

The clauses of the will of the testator which are involved in this controversy are the fifteenth, the twenty-second and the twenty-fifth.

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By the fifteenth clause he devised to his said daughters, Almyra and Patsey, a tract of about sixty acres of land in Garrard county and a tract of about forty acres in Lincoln county, and both of said tracts were devised "*to them and their heirs forever.*"

Having by the fourteenth clause of his will, directed his executors to sell certain other lands belonging to him, by the twenty-second clause he required his executors to collect all debts and demands due him from any source whatever, and to pay all of his just debts and all expenses incident to the final settlement of his estate, and all bequests made by him in his will. The following provision was then made, viz.: "All my estate remaining after such settlement I will and bequeath to my daughters, Almyra Baker and Patsey Baker, *to them and their heirs forever*, with the understanding that they are to pay out of such remaining fund" certain sums to certain of his grandchildren.

The twenty-fifth clause is in the following words: "In the event that *either one* of my daughters Patsey or Almyra, *should die without bodily issue*, then such portion of my estate as is devised *to them* shall *revert back to* and be equally divided *between the rest* of my children and the children of those who are dead; and if Kate Baker Denton or Harriet Baker Hopper die without issue, then that portion of my estate devised to them, or such one as shall die without bodily issue, shall be vested in my daughters Patsey and Almyra, to their use and benefit as above."

Kate Baker Denton is the wife of T. G. D. Cundall, and Harriet B. Hopper is the wife of W. P. McKee, and both, with their husbands, were made parties defendant to the action, and are appellees.

It seems that on the 23d day of December, 1879, the said

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Almyra and Patsey Baker, being at the time residents of Macoupin county, Illinois, each made a will in favor of the other, using precisely the same language, and also making their two nieces above named, in the event of the death of either, the ultimate beneficiaries. The language of each of these wills is as follows: "I give and bequeath to my sister" (one naming Almyra and the other naming Patsey) "all of my estate of every character, real, personal and mixed; but, should she die before I do, I give and bequeath all my estate, of every character, equally to my two nieces, Hallie B. Hopper and Kate B. Cundall, for their sole and separate use, free from the control of any husband that either of them may have.

"Given under my hand and seal, this 23d day of December, 1879."

After the death of Almyra and Patsey, which occurred in Macoupin county, Illinois, where they still resided, each of said wills was probated and admitted to record in that county, and a copy of each of them was admitted to probate and record in Garrard county by the county court in pursuance of the statute, but this was not done until after the commencement of this action in the Garrard Circuit Court. Meantime Almyra Baker, by deed bearing date the 1st day of June, 1892, and which was acknowledged before and certified to by the county clerk of Macoupin county, Illinois, and on such authentication lodged and recorded in the clerk's office of Garrard county on the 23d day of July, 1892, for the expressed consideration of $1,000, and the further consideration of love and affection, conveyed to appellees Kate B. Cundall and Hallie B. McKee, the sixty and forty acre tracts of land "that were once owned by Capt. Abner Baker, now deceased, and by him willed to Almyra and

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Patsey Baker, to have and to hold the same, with all the appurtenances thereon, to the second party, their heirs and assigns, forever, with covenant of general warranty."

The two wills of Patsey and Almyra Baker, and the deed of the latter referred to, were attacked in the petition, in which it seems all of the surviving descendants of Abner Baker joined, either originally or by amendment, except the appellees, Mrs. Cundall and Mrs. McKee and two others. They are set up and relied upon, however, in the answer of Mrs. Cundall and Mrs. McKee and their husbands in support of the title they claim to the two tracts of land, and the residue of the estate devised in the will of Abner Baker to his said daughters.

The questions at issue were raised by general demurrer of the plaintiffs to the answer of Mrs. Cundall and Mrs. McKee and their husbands, which was overruled, and by general demurrer of the latter to the reply of the plaintiffs to their answer, which was sustained; and in passing upon these demurrers the lower court held that the lands in controversy passed under the will of Abner Baker in fee simple to Almyra and Patsey Baker, and that by the wills of the latter and the deed of Almyra the said lands passed to appellees, Kate B. Cundall and Hallie B. McKee in fee simple. A judgment was accordingly entered dismissing the petition, and that judgment, on proper exceptions, is before us for review.

There is no doubt that the words in the fifteenth clause of the will of Abner Baker, by which the lands in controversy were devised to his daughters, Patsey and Almyra Baker, "to them and their heirs forever," were sufficient to vest them with absolute right and title to the lands at the death of Abner Baker, unless the title was made subject to

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be defeated by the twenty-fifth clause of his will, by which it was provided that, in the event of the death of either of his said daughters "without bodily issue," the portion of the estate devised to them should "revert back to" and be equally divided between the rest of the children "and the children of those who are dead."

The same question has been passed upon by this court in many cases involving the construction of similar testamentary provisions.

In the case of Thackstun v. Watson, 84 Ky., 206, the rule applicable in construing such provision is stated as follows: "The settled and well understood construction in reference to such devises seems to be that where an estate is given or devised with remainder over, but in the event the remainderman should die without child or children, then to a third person, the words 'dying without children or issue' are restricted or limited to the death of the remainderman before the termination of the particular estate; and it is equally as well settled that if an estate is devised to one in fee but if he die without issue or without leaving a child or children then to another, the first devisee takes a defeasible fee, which is subject to be defeated in the event of his death at any period without issue."

In the case quoted from the cases of Birney v. Richardson, 5 Dana, 424, and Pool v. Benning, 9 B. Monroe, 623, are referred to, and they fully sustain the rule as stated.

The same rule is recognized in Moran v. Dillehay, 8 Bush, 434, in Parrish v. Vaughan, 12 Bush, 37, in Bayless v. Prescott, 79 Ky., 252, in Cleveland v. Cleveland, 5 Ky. Law Rep., 56, and in many other cases decided in this State. Counsel on both sides in their briefs have referred to many of these cases, which we will not review in detail. It is sufficient

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to say that it will be found, upon examination of all of them, that the differences, if any, that exist between cases are apparent rather than real, and that they have resulted, not from a deviation from this rule, but from the application of it to the facts of each particular case, because it is a recognized principle that there can be no ironclad rule applicable alike to all cases, but that "the application of all rules of construction must necessarily be varied by the language used by the testator, the object being to arrive at his intention, to be gathered from the entire will." (Hughes v. Hughes, 12 B. Monroe, 115; Wills v. Wills, 85 Ky., 492; Bradley v. Skillman, 3 Ky. Law Rep., 734.) The most recent case of the kind decided by this court is that of Hood, &c. v. Dawson, 17 Ky. Law Rep., 880, in which the testator, after leaving all of his estate to his wife for life, at her death devised a certain farm to Jas. Wilson, son of Robert, with the provision that, if the devisee died "leaving no child or children of his own," the farm should go to certain nephews named in the will. The court, in construing this provision of the will, recognized and approved the rule referred to, and said that " cases involving similar or substantially similar language in other testaments have so often been before this court that the meaning to be attached to the one now under consideration is believed to be a question of authority and precedent rather than of argument."

In this case it is contended by the learned counsel for appellees that the provision in the twenty-fifth clause of the will of Abner Baker, for the disposition of the property devised to his two daughters Patsey and Almyra, in the event either of them "should die without bodily issue," refers or is limited to the death of either before the death of the testator. And so the lower court, in effect, held.

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But, under the rule as stated, this can not be the proper construction of that provision. Patsey and Almyra were not devisees in remainder. They were to be the first takers of the portion left to them under the will, and by the rule, at the death of the testator, they took a fee in the property in terms absolute, but subject to be defeated in the event of their death without issue. This, it seems to us, is the plain meaning of the will thus ascertained, and there is nothing in the will or in the circumstances of the testator or of the objects of his care and bounty, as shown by the record before us, that affords any indication that the testator had any other purpose or intention in this regard.

But Patsey and Almyra Baker having, under the will of their father been vested with a defeasible fee in the lands devised to them, the questions are raised, what was the character of their respective interests therein, and what effect, if any, did the death of Patsey have upon the interest therein of Almyra, who survived Patsey; and what interest, if any, in the property passed to the appellees, Mrs. Cundall and Mrs. McKee, by the will of Almyra and by her deed of June 1, 1892? The answer to these questions is not difficult. The property was devised to them jointly by the fifteenth and twenty-second clauses of the will, without any words of survivorship as between them, and there is nothing in the will upon which we would be justified in holding that it was the intention of the testator that, upon the death of one of them, the other should succeed to the whole of the property. But it is contended that, by the terms of the twenty-fifth clause of the will, the defeasance therein provided, upon the death of either of them, was intended to operate alike upon the title of both. We do not so construe this provision of the will. The words are, "in

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the event that *either one* of my daughters Patsey and Almyra should die without bodily issue, then such portion of my estate as is devised *to them* shall revert back," etc. Manifestly the use of the words " as is devised *to them*," in this clause, indicates that the testator understood fully that the interest his daughters would take in the property devised to them by the fifteenth and twenty-second clauses of his will would be a *joint* interest. But it would be too technical a construction to hold that he intended that the death of *either* of his daughters without issue should operate to divest the survivor of her interest in the property. Such a construction would be wholly inconsistent with any purpose the testator may have had to provide suitably for the comfortable support of *each* of his daughters after his death, because such a provision would have made it possible for the property intended for their enjoyment to be eventually divided, in the lifetime of the survivor, to others who had already been bountifully provided for by the testator during his life and by his will. We hold, therefore, that the titles of each of the daughters of the testator to her interest in the property devised to them jointly was a fee simple title, subject to be defeated alone by her death "without bodily issue."

It follows from the foregoing conclusions that Almyra Baker acquired no interest in the property in question under the will of her sister Patsey. But it also follows that upon the death of Patsey, Almyra, being one of the children of Abner Baker, became entitled, under the twenty-fifth clause of his will, to an interest in the moiety of Patsey in the portion of the estate that was devised *to them*, her title to which had been defeated by her death without issue. After the defeasance the words of the clause are "such portion

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of my estate as is devised to them *shall revert back to and be equally divided between* the rest of my children and the children of those who are dead." It is immaterial whether we construe the words "revert back to" to refer to the estate or to the descendants of the testator, since, in our view, the result, in either case, would be the same.

The material question to be settled is, who were to become entitled to the property in controversy upon the defeat of the title of the first takers under the will? We hold that the words "the rest of my children and the children of those who are dead" mean his children and the descendants of his dead children, *per stirpes*, who were surviving at the death of Patsey and of Almyra respectively; so that, at the death of Patsey, the three surviving children of Abner Baker (Almyra included), and the descendants, *per stirpes*, of such of his other children as were then dead, became entitled, under the will, to an equal division "*between*" them of Patsey's interest in the property, and at the death of Almyra the children of Abner Baker and the descendants of his dead children, who were surviving at that time, became likewise entitled to an equal division "*between*" them of the portion of said property to which Almyra was entitled under the will.

A different construction of this last provision of the clause is contended for by counsel for appellees on the authority of Purnell v. Culbertson, 12 Bush, 370. The construction we have given to it, however, is fully sustained by the case of Lackland's heirs v. Downing's ex'ors, 11 B. Monroe, 32, which we follow. The two cases are not inconsistent, as each case stands upon its own distinguishing facts, which is recognized and explained in the former.

But, as we have seen, Almyra became entitled under the

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will, as one of the surviving children of Abner Baker, to a share of the portion of her sister Patsey, at the death of the latter. Therefore, under the will of Almyra, and by the deed executed by her on the 1st day of June, 1892, the appellees, Mrs. Cundall and Mrs. McKee, are entitled to some interest in the property, but no more than was absolutely vested in her by virtue of the will of Abner Baker at the death of Patsey. It will be the duty of the lower court, in the progress of the action, to ascertain the extent of their said interest, and to make such orders as will secure it to them.

For the foregoing reasons the judgment of the lower court is reversed and the cause remanded, with directions to proceed in the cause consistently with this opinion.

CASE 37—PETITION EQUITY MAY 2.

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115 367
99 213
117 784
99 213
123 773

City of Louisville v. Leatherman, et al.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. TAXATION OF SCHOOL PROPERTY FOR STREET IMPROVEMENTS.—The property of a school board held by it for the use of the State, to carry on the system of common schools established under the Constitution, is not subject to execution or levy, or to decretal sale to satisfy a lien for street improvement.
2. SCHOOL FUND—TAXATION.—The appropriation of any part of a school fund or of the taxes which have been devoted to the purposes of the common school system, to the payment either of general taxation for the support of the State government, or of special assessments to pay the cost of street improvements, would

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be an appropriation thereof to another purpose than that of the school system, which is forbidden by section 184 of the Constitution.

3. LIABILITY OF CITY.—The city having the authority to contract for the work, but no authority to make it a charge upon the abutting property, is liable to the contractor for the cost of the work.

H. S. BARKER FOR APPELLANT.

(No brief in the record.)

JOHN M. RAMSEY FOR LEATHERMAN AND SELVAGE.

1. The city had the authority to contract for the work, and, although it may have had no authority to make it a charge upon the abutting property, it is liable to the contractors for the price of the work. (City of Louisville v. Nevin, 10 Bush, 550; Craycroft v. Selvage, 10 Bush, 698.)

RANDOLPH H. BLAIN FOR LOUISVILLE SCHOOL BOARD.

1. The State has established and undertaken to carry on a system of common schools; and the Louisville School Board is an arm of the State government, for that purpose, and its property is not subject to taxation for street improvements. (Ky. Stats., sec. 2833-4; Const., sec. 183-4; Ky. Stats., sec. 4363-77-84-99, 4427, 34-37-57; Allen v. Russell, 78 Ky., 116; Auditor v. Hollans, 14 Bush, 147; Kentucky Stats., 4427-39, Board v. Auditor, 80 Ky., 341; Whipple v. School Board, 7 R., 366; Trustees v. Flemingsburg, 17 R., 445; City v. Commonwealth, 1 Duv., 296; Directors v. School Directors, 42 Pa. St., 25; Trustees v. City of Trenton, 30 N. J. Eq., 668; City of Toledo v. Board of Education, 48 Ohio, 83; City of Hartford v. West Mid. District, 45 Con. 462; Inhab. of Worcester v. Worcester, 116 Mass., 193; Leonard v. City of Brooklyn, 75 N. Y., 498; Gooch v. Gregory, 55 N. C., 143; Dillon on Mun. Corp., 2d vol., 566-7, 777; Foster v. Fowler, 60 Pa. St., 32.)
2. The appropriation of school funds to any other than school purposes is unconstitutional. (Ky. Const., sec. 184; Collins v. Henderson, 11 Bush, 88; Auditor v. Holland, 14 Bush, 151.)

JUDGE DuRELLE DELIVERED THE OPINION OF THE COURT.

This record brings up for decision the question whether public school property, belonging to the Louisville School

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Board, can be subjected to the payment of an assessment for the original construction of a street.

Sections 2833-4, Kentucky Statutes, provide that the original construction of a street shall be at the cost of the owners of lots in each fourth of a square, and that a lien therefor shall exist on the land which may be enforced by proceedings in court. The remedy, therefore, if any, is by a judgment for the enforcement of the lien and the sale of the property, and the question is whether the property of the school board held by it for the use of the State to carry on the system of common schools established under the Constitution is subject to execution levy or to decretal sale to satisfy a lien for street improvements.

In our opinion it can not be subjected. The Constitution provides for a common school system and for the creation of a fund to maintain it, which shall be appropriated "to no other purposes." Sections 183-4.)

The statutes enacted in pursuance of these provisions of the Constitution provide for a board of education, a superintendent of public instruction, county superintendents and school trustees as agencies of the State to carry out the constitutional requirements. (Kentucky Statutes, section 4337, *et seq.*)

Both in the counties and the municipalities, the school trustees hold the school property in trust for the State for the use of the public schools. (Section 4437, *et seq.*, and 2949, *et seq.*)

The beneficial use of the property is the State's. The salaries of the teachers, being paid them for public purposes, are not subject to garnishment. (Allen v. Russell, 78 Ky., 105.)

The powers of the school board to sue and be sued, etc.,

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are limited to doing so "*for school purposes.*" (Section 2949.)

Being State property there is no need of an exception in the law to exempt the property held in trust by the school board from subjection to a lien for taxes or assessments. (City v. Commonwealth, 1 Duvall, 296; 17 Ky. Law Rep., 445.)

Moreover, it would seem that the appropriation of any part of the fund or the taxes which have been devoted to the purposes of the common school system to the payment either of general taxation for the support of the State government or of special assessments to pay the cost of street improvements would be an appropriation thereof to another purpose than that of the school system, and, therefore, forbidden by section 184, of the Constitution. (Collins v. Henderson, 11 Bush, 88; Auditor v. Holland, 14 Bush, 151.)

As the city had authority to contract for the work, but no authority to make it a charge upon the abutting property which belonged to the school board, it was liable to the contractor for the cost of the work, and the chancellor correctly so held. (City v. Nevin, 10 Bush, 550; Craycroft v. Selvage, 10 Bush, 698.)

Judgment affirmed.

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CASE 38—PETITION ORDINARY—MAY 3.

Louisville & Nashville Railroad Co. v. Queen City Coal Co.

APPEAL FROM LAUREL CIRCUIT COURT.

1. COMMON CARRIER—WHEN ITS DUTY TO FURNISH CARS.—It is the duty of a common carrier to acquire facilities for the transportation of commodities which it gives the public to understand it is engaged in carrying, in such quantities as may be ordinarily expected to seek transportation; but it is not required to anticipate an unprecedented and unexpected press of business, and to keep extra rolling stock to meet such a contingency; and under such circumstances it may decline to receive freight for transportation without incurring any liability.
2. SAME.—Where a railroad company received its coal supplies necessary to operate its engines from a coal district on its line, and there was a strike of the employes of all the coal companies in that district, except one, and the railroad company was compelled to take all its available rolling stock to another coal district in order to haul coal to supply its engines, it had a right to refuse to furnish cars for the transportation of coal to the one company in operation in the first district.

J. W. ALCORN AND J. A. CRAFT FOR APPELLANTS.

1. On a former appeal in this case the Superior Court held that where a railroad company by a strike of the miners at coal mines from which it had been accustomed to obtain a large part of the coal which it used in the operation of its road, was compelled to seek other fields for a supply, thus making it necessary to withdraw its engines and cars from that line of its road and use them in carrying coal for its own consumption, these facts constituted a sufficient excuse for its refusal to furnish the owners of a coal mine on that line of its road with engines and cars for the transportation of their coal. (13 Ky. Law Rep., 832.)
2. The verdict is not sustained by the evidence or the preponderance thereof.

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3. The instruction as to the measure of damages was erroneous. It authorized the jury to find in damages "any reasonable profits he could have made from the coal which *could* have been mined during that time by the miners in his employment," thus basing the damages upon the *utmost capacity* of the miners to dig coal during that time.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

East Bernstadt is a station on the Knoxville branch of the L. & N. R. R., and situated within the territory wherein coal mining is carried on, known as the Laurel district. The Queen City Coal Co. operated a mine and shipped its coal from East Bernstadt on appellant's road. After the middle of August, 1887, until some time in the following September the appellant refused to furnish appellee coal cars for the shipment of coal. It had been the custom of the appellant to so furnish coal cars to the appellee previous to that time. On or about the 16th of August, 1887, appellant's agent gave the appellee notice that no cars would be furnished for the shipment of coal to private persons.

This action was instituted by appellee to recover damages of appellant on account of such refusal. The appellant is a common carrier, had provided itself with cars and engines suitable for the transportation of coal, and by that method and in receiving and carrying coal had notified the public it was engaged in the business of carrying coal. The fact that it carried such coal as was offered for shipment before and after the time mentioned showed it had provided itself with reasonable facilities and appliances for the transportation of coal from the Laurel district. It is the duty of a common carrier to acquire facilities for the transportation of commodities which he gives the public to understand he is engaged in transporting. In doing so he is only

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required to place himself in such situation as will enable him to carry the quantity of such commodities as may be ordinarily expected to seek transportation. He is not required to anticipate an unprecedented and unexpected press of business and to keep extra rolling stock to meet such contingency. (Hutchison on Carriers, section 292.)

"He may refuse goods beyond the facilities he possesses for transporting them. When, by reason of unusual pressure of business, the rolling stock of a railroad is inadequate for the transportation of freight, the company may decline to receive without incurring any liability." (Lawson's Rights, Remedies and Practice, section 1804.)

The same doctrine is enunciated in H. & T. C. Ry. Co. v. Smith, 63 Texas, 322 and Thayer, &c. v. Burchard, 99 Mass., 508.

A strike of the coal miners in the Laurel district (except the mines of the appellee) began between the 1st and 15th of August, 1887, and continued until some time in the following September. The uncontradicted testimony in this record shows that the L. & N. R. R. Co. procured the supply of coal from this district for the use of the engines on certain parts of its road; that when the strike began this supply failed; that it was then compelled to take much of its rolling stock used for transportation of coal from the Laurel district to the Henderson division to transport coal from the mines on that division to supply coal for its engines; that the rolling stock which had been used on the Knoxville branch for the transportation of coal was necessarily used for the purpose of carrying coal for the use of its engines, for carrying cross ties for its road, etc.; that the change of the base of supplies caused delay in getting the coal cars from the Knoxville branch to the Henderson

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division; that the distance from the Laurel mines to Louisville, where the coal was carried for distribution to the engines, was 150 miles, and from mines from which coal was carried over the Henderson division it was 220 miles, thus requiring more cars and engines to transport the needed coal; that soon after the strike ended the railroad began to furnish the appellee and other coal operators in the Laurel district with cars necessary to transport their coal.

These facts excused the appellant in its refusal to furnish appellee with cars to carry coal, while the conditions existed which we have related. The only testimony introduced to contradict the undisputed testimony for the appellant is the testimony of some witnesses to the effect that on occasions during the strike some empty coal cars were seen in switches on the Knoxville branch. Admitting this to be true, it does not contradict the testimony of the witnesses of the appellant materially. Some of these cars might have been out of repair, others awaiting engines to haul them to other coal mines on the Henderson division, and the others awaiting the necessary business of the appellant. After the strike began all local coal trains were discontinued.

The appellant was not bound to take an engine, gather up coal cars and transport the coal of the appellee. The appellant owed a duty to the public to keep its freight and passenger trains on its lines of road running. It could only do this by obtaining the necessary fuel for its engines. To obtain this it was necessary, as appears from this record, to change rolling stock from the Knoxville to the Henderson division. It was far more important that the appellant should continue its general freight and passenger business on such lines as were supplied with fuel from Louisville

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than to transport the coal for the appellee. The evidence offered by the appellee did not in a material degree contradict that of appellant, and the verdict is not supported by the evidence. For that reason a new trial should be granted.

We have not considered the question as to the measure of damages had the plaintiff's evidence sustained the verdict, because the rule as stated in the opinion of the Superior Court must control in this case, regardless of our view as to the correctness of the opinion of that court on that question.

The judgment is reversed, with directions to grant the appellant a new trial, and for further proceedings consistent with this opinion.

CASE 39—CONTESTED ELECTION—MAY 5.

Wilson, et al. v. Hines, et al.

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108 452
99 221
108 318
99 221
e110 268
99 221
j112 31
j112 39
j112 49
112 64
99 221
113 867
99 221
119 64
99 221
130 504
131 338
f134 709

APPEAL FROM WARREN CIRCUIT COURT.

1. CONTESTED ELECTION—BOARD OF CONTEST—JURISDICTION—APPEAL.—A contested election board has jurisdiction to determine the constitutionality of the act under which the election in question was held; and a judgment by it to the effect that the act under which the election was held is unconstitutional, and the election therefore void, is a final judgment from which an appeal may be prosecuted.
2. NOTICE OF CONTEST—GROUNDS—AMENDMENT.—Although the statute regulating election contests requires that the notice shall state the grounds of the contest, and provides that none other shall afterwards be heard as coming from said party," still he is

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not precluded thereby from amending and making more specific and definite any ground that is embraced in the notice. (Civil Code, sec. 134.)

3. CONSTITUTIONAL LAW—PASSAGE OF ACT.—The act of August 6, 1892, known as the Local Option Law, must be taken to have been passed in conformity to all the requirements of the Constitution with reference to the enactment of laws. (Lafferty v. Huffman, *ante*.)

4. LOCAL OPTION ELECTION—RECEIVING PETITION FOR BY COUNTY JUDGE.—Under the provisions of the act of August 6, 1892, requiring the county judge, at the "next regular term" of the county court, after receiving the petition for an election, to make an order therefor on some day not earlier than sixty days after said application is lodged, it is necessary that the petition should be received in court and a record made of it. And an election held where the petition was received by the county judge out of court on one day, and the election ordered the next day, which was the first day of the term, is void.

J. A. MITCHELL FOR APPELLANT.

1. The contestants had no right under the statute to file new grounds of contest, or amend the grounds in the original notice. (Ky. Stats., sec. 1535; Cowan v. Prowse, 93 Ky., 163.)
2. The contest board had no power, nor had the lower court on appeal from the decision of the board, to try and determine the constitutionality or validity of the act under which the election was held. (Seeman v. Hinton, 1 Duv., 41.)
3. The courts will not resort to the journals of the two Houses of the legislature, or either of them, to ascertain whether a bill was passed in the manner required by the Constitution, but will assume that it was so done. (Norman v. World's Fair Managers, 93 Ky.; Field v. Clark, 143 U. S., 661 and cases there cited; Grobe v. Cushman, 45 Ill., 124; People v. Wolfe, 62 Ill., 253.)
4. The petition was received by or lodged with the county judge before the beginning of the term of the county court at which the order was entered, and that was a compliance with the statute.
5. But if the act of August 6, 1892, was void, the election was valid under the general local option law of 1874.

E. W. HINES ON SAME SIDE.

1. The granting in the charter of cities of the third class such cities the power "to license, tax and regulate the sale of spirituous,

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vinous and malt liquors in the city, or within one mile thereof," does not operate to repeal the provisions of the general local option law as to the city. (Const. of Ky., sec. 61.)

SIMS & COVINGTON FOR APPELLEES.

1. The board of contest only decided that it had no right to compare the vote or certify the vote either way, and that was not a judgment from which an appeal could be taken. The contestee's only remedy was by writ of mandamus to compel them to do so. (Sec. 477, Civil Code; Am. & Eng. Enc. of Law, vol. 14, p. 105; Page v. Hardin, 8 B. M., 651; Batman v. Megowan, 1 Met., 538; Cox v. Kash, 1 Bush, 201; Clark v. McKenzie, 7 Bush, 527; Gayle v. Owen Co., 83 Ky., 61.)
2. The board had jurisdiction to hear and determine all the questions raised in the various grounds of contest including the validity of the act under which the election was held. (Cowan v. Prowse, 93 Ky., 156; Broaddus v. Mason, 16 Ky. Law Rep., 40; Robertson v. State of Indiana, 10 N. E. Rep., 600.)
3. The contestants had the right to amend and make more explicit the grounds set out in the notice of contest. (Am. & Eng. Enc. of Law, vol. 6, p. 407.)
4. The local option law was not passed in the manner required by the Constitution, and is therefore void. (Norman v. Board of World's Fair Managers, 93 Ky., 537; Varney v. Justice, 86 Ky., 601; Black's Constitutional Law, p. 285; Ryan v. Lynch, 68 Ill., 160; Banks v. Ottawa, 105 U. S., 667; Cooley's Constitutional Limitations, p. 162; Greenleaf on Evidence, secs. 480-1-2-3.)
5. The order for the election was prematurely made, as it was made at the term when it was received within the meaning of the local option law.

WRIGHT & McELROY ON SAME SIDE.

1. There was no such judgment by the board as could be appealed from, and the appeal should have been dismissed. (Am. & Eng. Enc., pp. 105 and 108; 1 Met., 538; Clark v. McKenzie, 7 Bush, 527; Taylor v. Owens, 83 Ky., 61.)
2. The order for the election was void because it was prematurely made. It should not have been entered until the following term after the record showed that the petition was received. (Doores v. Varnon, 15 Ky. L. R., 244; Neece v. Commonwealth, 78 Ky., 588.)
3. The local option law was not passed in the manner required by the

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Constitution, and is, therefore, void. (Norman v. World's Fair Com'rs, 14 Ky. L. R., 529; Am. & Eng. Enc., sec. 6, p. 293.)

4. The local option law is repealed in so far as it applies to cities of the third class by the charter for cities of that class. (Haynes v. Com., 15 Ky. Law Rep., 8; Gifford v. Commonwealth, Law Rep., 437.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

This case is before us on appeal from the judgment of the Warren Circuit Court in a case involving the validity of an election held in the city of Bowling Green on the 1st day of July, 1893, under the "local option act" of August 6, 1892 (chapter 89 of Session Acts of 1891-2-3). The election was on the proposition whether spirituous, vinous or malt liquors should be "sold, bartered or loaned" in the said city, which was submitted by the county judge upon petition of the requisite number of voters in the different voting precincts of the city, by an order made in the county court on Monday, the 24th day of April, 1893, it being the first day of the April term of the court in that year, the petition having been received by the judge on the day before. The election resulted in a majority of twenty-eight against the traffic, which was ascertained and certified as required by the statute by the canvassing board of elections of Warren county.

Within the prescribed time after the final action of the board the appellees gave notice of contest, as provided in the act, and to this proceeding the appellants entered themselves as contestees. The case was prepared and brought duly before the board created by statute for determining the contested elections of county officers, jurisdiction being conferred on the board in such cases by the act.

There were several grounds of contest set out in the notice, all of which were controverted by the contestees.

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either by denial or by demurrer, but it will be necessary for us to notice only two of them. These are, first, that the law under which the election was held was not valid, but was unconstitutional and void; and second, that the order for the election was made by the county judge, not at the next regular term of the county court, after he received the petition, but on the day the petition was received by him.

After the notice was given and after the names of the contestees had been entered, and more than ten days after the final action of the contesting board, the contestants attempted to amend the first ground of contest, above named (it being the eighth ground stated in the notice), by setting forth in detail the reasons for the alleged invalidity of the act under which the election was held, the object being to show that the act of August 6, 1892, was not passed in the manner prescribed in the Constitution so as to become a valid and binding law, which proposed amendment was filed in the clerk's office.

This was objected to by the contestees before the contesting board, which, against the objection of the contestees permitted the amendment to be filed, on the motion of the contestants, for the purpose, as was claimed, of making that ground more definite.

Upon the trial the contesting board refused, in its final action, to pass on any of the grounds of contest alleged except the eighth, as amended, and upon that decided that the act of August 6, 1892, was "unconstitutional and void," and that it conferred upon the board "no authority for any purposes whatever," and thereupon adjudged that the board had "no authority to compare the vote or to certify a majority of the vote either way. The contestees prosecuted an appeal from this action of the board to the circuit court.

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When the case came up for trial on the appeal, the appellees moved the court to dismiss the appeal on the ground that the action of the contesting board was no judgment that could be appealed from. The court overruled the motion to dismiss, and this is complained of as error by counsel for the appellees, whose contention is that the remedy of the appellants was not by appeal, but by a mandamus to compel the contesting board to proceed to try the case and to decide the contest one way or the other. It is manifest that the ruling of the court in this regard was right. The action of the contesting board was in effect a judgement in favor of the contestants, that the result of the election was not to prohibit the traffic in liquors in the city of Bowling Green, and of that judgment the contestees had the right to complain and to have corrected and reversed by appeal if erroneous.

With reference to that judgment, however, counsel for appellants insist that the contesting board had no jurisdiction in this contest of the question as to the invalidity of the act of August 6, 1892, on the grounds alleged in the amendment which the contesting board permitted to be filed, or in the eighth ground of contest as amended; first, because the board had no lawful authority to permit the grounds of contest stated in the notice to be amended and second, because the board had no right to decide upon the question of the invalidity of the act, even if it was proper to permit the grounds of contest to be amended.

The first objection can not be sustained. The law regulating such contests (Kentucky Statutes, section 1535), requires that the notice shall state the grounds of the contest and provides that "none other shall afterward be heard as coming from such party." Under this statute a

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contestant is not allowed to set up, by way of amendment, an entirely new ground of contest, in addition to those stated in his notice, but he is not thereby precluded from amending and making more specific and definite any ground that is embraced in the notice. This may be allowed, and in fact may be required to be done under the Civil Code (section 134), which applies to proceedings of this kind as well as to regular actions, and under which it was proper for the board and the lower court to permit the contestants to amend, as was done, in such a manner as to make definite the charge that the act under which the election was held was not in force and the reasons for it. That did not in this case make a new or additional ground of contest, but simply made more definite and certain one of the grounds of contest stated in the notice.

The second objection is equally untenable. In support of it counsel refer to the cases of Leeman v. Hinton, 1 Duvall, 40, and Commonwealth v. Jones, 10 Bush, 789, as showing that the contesting board was restricted in the performance of its functions under the statute. But on examining these cases it will be found that it is held that the boards are restricted as to the methods by which, or the evidence upon which, they may decide questions before them rather than as to the questions which they are allowed to decide. And we hold that under the law they are clothed with power and authority to consider and decide upon any matter or thing that is a lawful ground of contest, unless restricted by the statute which prescribes their authority and jurisdiction. But in every case they are to be governed by the rules of evidence as well as by the law regulating their proceedings, and their action is subject to review and correction on appeal, which the statute allows.

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But the lower court, in an elaborate opinion and by its judgment, held that the act of August 6, 1892, was not passed in pursuance of the method of enactment prescribed by the Constitution, and that it was on that account invalid, and was, in fact, not a law. The same question has been before this court in several cases, recently decided, in which it was held that the act in question must be taken to have been passed in conformity to all the requirements of the Constitution with reference to the enactment of laws. (Lafferty v. Huffman, *ante;* Commonwealth v. Shelton, *ante;* Commonwealth v. Hardin County Court, *ante.*)

We adhere to the opinion in each of these cases, and now hold that so much of the judgment of the lower court in this case as holds that the said act was not passed in pursuance of the constitutional requirements, and was, therefore, invalid, is erroneous. But the lower court adjudged that the action of the county judge in ordering the election at the time, the order was made was unauthorized, and that the said order was void. In this we concur. The first section of the act made it the duty of the county judge, at the next regular term of the county court "*after receiving* the petition" of the requisite number of voters of each precinct of the territory to be affected, "to make an order on his order book directing an election to be held in the said county, city, town, district or precinct, as the case may be," on some day " not earlier than sixty days *after said application is lodged with the judge of said court.*"

We have seen that the petition was handed to the county judge on Sunday, the day before the first day of the April term of the county court in 1893, and that the order directing the election to be held was made on the first day of

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that term of the court. These requirements are similar to those contained in section 4464 of Kentucky Statutes with reference to holding elections for graded schools under the common-school laws of the Commonwealth. That section requires an election to be ordered by the county judge at the "next regular term of his court after he receives said petition" of a certain number of legal voters who are tax-payers, the election not to be "earlier than forty days from the date of the order."

That section has been construed to require the county judge to make the "receiving" of the petition a matter of record in his court at one term, and to order the election at the "next regular term," thereafter. We think the same construction should be given to the first section of the act of August 6, 1892.

Counsel contend that the use of the word "lodged" in the latter act requires a different construction of it from that given to section 4464 of Kentucky Statutes, in Doores v. Varnon, 94 Ky. Rep., 507, and in Webb v. Smith, 17 Ky. Law Rep., 1308, but in this view we do not concur. We do not understand the word " lodge" when used with reference to such matters to mean simply to leave with or in the possession of the officers. In our opinion it imports that the instrument or writing "lodged" is to be made a matter of record in some way, and in this case is not to be construed differently from the word "received" as used in this act and in the section of the Kentucky Statutes referred to; and in our opinion it was intended that the petition should be "received" in court and there made a matter of record by the proper order entered on the order book showing that it has been received and filed, and the purpose of it, and that the order for the election should be made at the next

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regular term of the court thereafter. It follows that in this case the order for the election was not made at the proper time, and the election was not lawfully held.

For the reasons given the judgment of the lower court is affirmed.

The court delivered the following response to a petition for rehearing, Oct. 1, 1896:

Counsel for the appellants, in their petition for a rehearing, ably argue that the court erred in the construction put upon the first section of the act of August 6, 1892, on which the judgment of the court below was affirmed, and endeavor to distinguish this case from Doores v. Varnon and Webb v. Smith.

In the conclusion of their petition they say that the rule laid down "for the first time in this case" is "a rule in direct conflict, not only with the plain language of the statute, but in conflict with the ruling of the court, just one month before in the case of Commonwealth v. Shelton, *ante*," but after carefully reviewing the opinion in the light of the argument of the petition of the learned counsel and the authorities quoted by them, we see no reason why the rule laid down in the opinion, and which is so vigorously attacked by counsel, should be changed.

Section 4464 of the Kentucky Statutes, providing for holding elections in the graded common school districts under the common school laws, and section 1 of the act of August 6, 1892, providing for holding local elections with reference to the traffic in ardent spirits, both require the county judge to make an order for the election "at the next regular term" of his court after the petition is received by him, asking that the election be held. Both sections provide that the application for the election shall be made

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to the county judge, who is required to deal with it and act upon it, as the judge of the county court, which, in the opinion of this court, means dealing with and acting upon it in open court, and not elsewhere. This is the rule laid down in Doores v. Varnon and in Webb v. Smith, and which was followed in the opinion in this case.

The former section, prescribing the duty of the judge to make the order " at the next regular term" of his court, uses the words "after he receives said petition," and the latter section uses the words " after receiving said petition." Both expressions have the same meaning, and, as construed by this court, the "receiving" of the petition must be an act of record in the court. The former section authorizes *the court*—that is, "the said judge *in said order*"—to fix the day for the election not earlier than forty days "from the date of said order." The latter section requires the day for the election to be named in the petition, "not earlier than sixty days after said petition *is lodged* with the judge of said court."

The court adheres to the meaning of the word "lodged" that is given in the opinion. It was manifestly intended by the Legislature to refer to the act of "receiving" the petition, or of making the application by petition for the holding of the election as the starting point from which to compute the time within which the election might be held.

Counsel are mistaken in supposing that the case of the Commonwealth v. Shelton, *ante*, was overlooked by the court in deciding this case. It was not only not overlooked but was referred to in examining the question, but it was not referred to in the opinion, because the question there decided was entirely different from the question in this

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case. The question there decided was as to the proper mode of computing the time within which to hold the election or the act from which the computation was to be made. So far as it appears from the opinion in that case the question as to whether the election was ordered at the proper time was not raised in that case; and so the rule followed here is not in conflict with the ruling there, as counsel seem to think.

Not doubting that we have correctly construed the section of the statute under which the election was ordered and held in this case, the petition is overruled.

CASE 40—PETITION EQUITY—MAY 5.

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McHenry v. Selvage, et al.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

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129 535
f129 773

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138 400

1. STREET IMPROVEMENT—ORIGINAL CONSTRUCTION.—Where a portion of an old turnpike road became a public way of a city by reason of the extension of its limits, so as to include the same, the re-grading and paving thereof was "original construction" within the meaning of the statute, which provides that when the improvement is the original construction of a street, it shall be made at the exclusive cost of the owner of the lots; but when the improvement is the reconstruction thereof, the city shall pay the costs.
2. APPORTIONMENT—ASSESSMENT.—It is immaterial for the purposes of this case whether the apportionment was made on the correct basis or not, as it does not appear that under a different method of apportionment, the appellant would be required to pay less than under the method adopted.

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STREET IMPROVEMENTS—LIENS—VALIDITY OF STATUTE.—A statute which provides that copies of the ordinance authorizing the improvement, a copy of the contract therefor, and of the apportionment, each attested by the clerk of the board of council, shall be proof of the passage, approval and publication of the ordinance, and *prima facie* evidence of every other fact necessary to be established by the plaintiff in actions to enforce liens for street improvements is valid. (Zable v. Orphans' Home, 92 Ky., 91.)

HELM & BRUCE FOR APPELLANT.

1. The method of apportionment adopted in this case does not apply where the property is divided off into squares, as it was in this case. (Burnett's Code, chap. 36, sec. 2.)
2. All ordinances before they are enforced shall be published in at least one or more of the daily newspapers published in Louisville. (Charter of Louisville; Ormsby v. City of Louisville, 79 Ky., 197.)
3. The portion of the old turnpike in question was used and treated as a city highway by the city for years after it was included within the city limits, and was several times repaired; and the present improvement, it seems conclusive, was *re*-construction and not original construction, and the city should, therefore, pay for the same.

LANE & BURNETT FOR APPELLEES.

1. Under the amendment to the Louisville city charter, approved March 24, 1882, the proper allegations in a petition of all the steps leading up to the creation of a lien for street improvements, when supported by the exhibits provided for therein, creates in the face of a mere denial; a *prima facie* case. (Zable v. City of Louisville, 13 Ky. Law Rep., 387.)
2. The improvement of a public way that has formerly been a turnpike road within the city, under the first ordinance and contract therefor, passed and made by the General Assembly was an improvement by original construction. (Dulaney v. Bowman, Burnett's Digest pp. 540-1.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Whether the lot owners shall pay the cost of improving Shelby street in the city of Louisville, or whether said improvement must be at the expense of the city, is the chief question on this appeal.

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The statutes provide that when the improvement is the *original construction* of any street, road, lane, alley or avenue such improvement shall be made at the exclusive cost of the owners of the lots; but when the improvement is the reconstruction of such streets, etc., the city is to pay the costs. The law seems to have been founded on the theory that for such original construction the lot owners should meet the expense because they are proportionately benefited; but that, when the owners have done this much, the city should thereafter maintain the way.

The street in question was originally a turnpike road leading into the city. By an act of the General Assembly, in 1868, the limits of the latter were extended so as to include a portion of the road, and it was thereafter a public way of the city and as such a few repairs were made on it.

In 1890, for the first time, an ordinance was passed looking to a radical improvement in the old road, and making it conform to the general street system prevailing in the city.

The carriage way of the street, from the center line of Meriwether avenue, if extended, to the center line of Stonewall street, was to be thirty-six (36) feet in width, and be improved by grading and paving with macadam pavement, with corner stones at the intersections of streets and alleys, flagstone gutters, and footway crossings across all intersecting streets and alleys, all in accordance with the drawings and specifications on file in the city engineer's office.

In our opinion this was an original construction of the street by the city within the meaning of the statute, and the costs should be borne by the lot owners.

It appears that the method of apportionment was based on the assumption that the contiguous property was not

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divided into squares by principal streets, and it is the appellant's contention that the property was in fact so divided, and that, therefore, the method applied was erroneous. While the record does not show clearly the situation of the property in this respect, the exhibits, maps, etc., seem to show no such division into squares; but if it were otherwise, it does not appear that, under a different method of apportionment, the appellant would be required to pay less than under the method adopted.

It is further contended that the ordinance under which the work was done was not published as required by the charter.

Proper averment on this behalf is found in the petition, but this is denied by the answer, and there is no testimony on the subject.

The statute, however, disposes of this question by providing that copies of the ordinance authorizing the improvement or work, a copy of the contract therefor and of the apportionment, each attested by the clerk of the board of councilmen, shall be proof of the due passage, approval and publication of the ordinance and *prima facie* evidence of every other fact necessary to be established by the plaintiff in actions to enforce such liens. And this statute was upheld in Zable v. Louisville Baptist Orphans' Home, 92 Ky., 91.

The judgment is affirmed.

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CASE 41—PETITION ORDINARY—MAY 6.

Ragsdale v. Ezell, &c.

APPEAL FROM TRIGG CIRCUIT COURT.

1. INSTRUCTIONS—EVIDENCE—BURDEN OF PROOF.—Upon the trial of an action for criminal assault, there being no witnesses except the plaintiff and defendant, an instruction in explaining the burden of proof "that this does not necessarily mean the plaintiff must have two witnesses to the wrongful act, but that the case in all its facts and circumstances given in evidence, must preponderate, in their judgment, in favor of the plaintiff" was erroneous. In such a case the jury should be left to determine from the evidence, taken in connection with the facts and circumstances detailed by each, which of the two is to be believed.
2. PREPONDERANCE.—The word "preponderance" should not be used in such instructions, as it is only calculated to embarrass the jury when considering the issue.
3. EVIDENCE—STATEMENTS OF THIRD PERSONS.—Where the defendant shortly after the alleged assault had gone by the plaintiff's house and told her to tell her husband that C. could let him have tobacco plants, it was error to permit a witness to state by way of showing that defendant must have gone there for some other purpose, that a tenant on C's farm had told him that C was at that time short of tobacco plants.

W. G. BULLITT FOR APPELLANT.

1. The evidence of the witnesses that the negro on his place had told them Cooper had no tobacco plants to spare, was not competent. It would not have been proper to prove that even by Cooper himself.
2. The instruction which was condemned by the Superior Court on a former appeal, was given again by the lower court, in total disregard of the opinion and mandate of that court.

C. H. BUSH AND FENTON SIMS ON SAME SIDE.

(No brief in the record.)

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J. E. KELLY FOR APPELLEES.

1. The verdict and judgment is sustained by the evidence and all the admitted facts and circumstances in the case.
2. The conduct of plaintiff's attorney in the argument of the case could not have prejudiced the defendant's case, as the jury was instructed on that point by the court before they retired.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This case was appealed originally to the Superior Court, and the judgment below reversed because of an erroneous instruction.

On the return of the case the identical instruction was given and the plain mandate of the Superior Court disregarded. The action is for an alleged criminal assault made on the plaintiff, a married woman, her husband being also a party to the action. The assault is proven by the testimony of the plaintiff (the wife), and disproven by that of the defendant. Facts and circumstances are detailed by each witness in support of their testimony, all of which went to the jury and were doubtless considered.

The court below, as there was but one witness establishing the assault, took occasion to say to the jury that no greater amount of testimony than that of one witness was necessary to make out the plaintiff's cause of action, and this, as the Superior Court held, was calculated to impress the jury with the belief that in the opinion of the trial judge, the case had been made out for the plaintiff and a recovery must follow. The court on the first trial, in telling the jury the burden of proof was on the plaintiff, said that "this does not necessarily mean the plaintiff must have two witnesses to the wrongful act, but that the case in all its facts and circumstances given in evidence must preponderate in their judgment in favor of the plaintiffs."

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On the return of the cause on the second trial this identical instruction was given without any qualification or explanation. As an abstract proposition the instruction is not open to objection, but where a trial court undertakes to place the right of recovery upon the preponderance of testimony in favor of the plaintiffs or those holding the affirmative of the issue, it often becomes necessary to explain what is meant by the preponderance of proof, and in doing so a jury is often misled by the trial court. On an issue of fact the party holding the affirmative or making the charge must make out his case, and when testimony is introduced on both sides as in this case the jury should be told: "If they believe from the evidence the defendant, Ragsdale, assaulted the plaintiff as charged in the petition the plaintiff is entitled to recover not only the actual damage sustained, but such further sum by way of exemplary damages as the case may warrant, not exceeding the amount claimed."

If it required only one witness to make out plaintiff's case it required only one witness to make out the defense, and, therefore, the jury should be left to determine from the evidence in connection with the facts and circumstances detailed by each which of the two is to be believed. Facts and circumstances in support of the main issue when proper go to the jury as evidence, and it is unnecessary for the court, after the admission of these facts, to call the attention of the jury to them by saying they must be considered or they may decide for the plaintiff, although he has but two witnesses to the main transaction and the defendant has three or more. The manner of the witness, the circumstances detailed by him may lead the jury to believe that he is mistaken or that no credence is to be given his state-

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ments. At least it is for the jury to determine from the evidence whether or not the plaintiff is entitled to recover, or has the defendant by his testimony shown that no cause of action exists. The word preponderance should be omitted from such instructions, as it is only calculated to embarrass the jury when considering the issue.

There is another serious error committed by the court below in the admission of testimony. On the same day and in a short time after the alleged assault it is shown the defendant returned to the home of the plaintiff in company with his brother, and told the family to say to the husband of the plaintiff that he had seen a man by the name of Cooper, who had agreed to let him (the husband) have tobacco plants. It seems the husband was a tenant of the sister of the defendant, and was scarce of tobacco plants.

In order to show that the return to the house by defendant was for some other purpose, or with a view of contradicting Cooper, the court permitted the introduction of two witnesses over the objection of defendant to state that one Henry Dawson, who lived on Cooper's farm, told them that Cooper had no tobacco plants to spare. That this testimony should have been rejected is too manifest to discuss. Reversed and remanded for a new trial, and proceedings consistent with this opinion.

The court delivered the following response to a petition for rehearing May 27, 1896:

If as contended the instructions were not excepted to, and this seems to be the case, still there is left the objection to the incompetent testimony that must necessitate a reversal.

Petition overruled.

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CASE 42—PETITION EQUITY—MAY 7.

Traders' Deposit Bank v. Hoffman, et al.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. COMMENCEMENT OF ACTION—NON-RESIDENT.—In an action to have the acts of an insolvent debtor in an effort to prefer one creditor over others declared to operate for the benefit of all his creditors under the statute, it is not a commencement of the action as against the transferee, who is known to plaintiffs to be a non-resident of the State, merely to file the petition and issue summons against him as if he was a resident of the State, within the six months.
2. FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE—WARNING ORDER.—The Code furnishes a plaintiff the means and directs the manner in which a non-resident defendant may be properly brought before the court, and if a plaintiff in such an action as this fails to avail himself of the process so provided, within the time prescribed by the statute, his action is not commenced in time to have determined the effect of the act of which he complains.

O'REAR & BIGSTAFF FOR APPELLANT.

1. The allegations of the original and amended petition taken together, were sufficient to maintain the action under the statute prohibiting fraudulent preferences.
2. The doctrine is well established that a judgment can not be made available as an estoppel unless it is a judgment on the merits, and, therefore, the judgment of the Federal Court on demurrer to appellant's intervening petition can not be an estoppel to this action. (Freeman on Judgments, secs. 260-1.)
3. It appear that the non-resident, Hoffman, was a resident of Cincinnati, Ohio, but had considerable business interests just across the river in Covington, Ky., and was frequently there, and we insist that the issual of the summons against him to that county, was in good faith, and should be considered the commencement of the action.

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J. J. CORNELISON AND COLLINS & FENLEY FOR APPELLEES.

1. The statement by a clerk in the copy of a record that "the summons that issued on the foregoing petition to Kenton county, can not be found among the files in my office," is not sufficient evidence that such a summons was ever issued. (Mitchell v. Commonwealth, 78 Ky., 204; Forest v. Crenshaw, 81 Ky., 51.)
2. Section 39 of the Civil Code, provides that an action can only be commenced by filing the petition "and by causing a summons to be issued or a warning order to be made thereon;" and sections 51 and 58 provide for a warning order when the defendant is a non-resident.
3. The issual of a summons to Kenton county, with a hope of getting it executed on Hoffman there, because it was a border county and near the place of his residence in an adjoining State, does not constitute a *lis pendens* against him. Where the defendant is a non-resident of the State, no other summons is known to the law except a warning order. (Hoffman v. Brungs, 83 Ky., 404; Hall v. Grogan 78 Ky., 1.)
4. If the proceedings are not begun as against all the defendants within the six months given by the statute, the petition must be dismissed. (Cecil v. Sowards, 10 Bush, 97; Savings Bank v. McAllister, 83 Ky., 132; Hoffman v. Brungs, 83 Ky., 404.)
5. The appellant has had its day in court by the proceedings in the Federal Court where there was an adjudication of its rights, under all the facts stated in this action, and the question is, therefore, *res adjudicata*.
6. The judgment of a Federal Court can not be attacked, set aside, changed or modified by a proceding in the State courts. (Central Trust Co. v. Seasongood, 130 Ohio, 483; Table's Case, 13 Wall, 397; Peck v. Jennes, 7 How., 612; Randall v. Howard, 2 Black, 585; Nogue v. Clapp, 101 U. S., 551; Wilcox v McConnell, 13 Pet., 498; Verees v. Bank, 10 Pet., 449, 7 Cranch, 299, 13 Pet., 136, 31 How., 506, 5 Cranch, 11; Veach v. Rice, 131 U. S., 293; R. R. Co. v. Gomilla, 132 U. S., 480.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The petition was filed on the 18th day of July, 1891, against G. W. Goodpaster and Chas L. Gray, and H. H. Hoffman seeking to have the property of Goodpaster and Gray, who were partners under the firm name of G. W. Goodpaster & Co., subjected to a *pro rata* distribution

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among their creditors, including the plaintiff. As a ground therefor it is alleged that Goodpaster and Gray, in contemplation of insolvency and with a design to prefer Hoffman to the exclusion of the plaintiff and their other creditors, procured Hoffman to institute a suit on the 16th of March, 1891, in the United States Circuit Court against them, to sue out an attachment therein against them and to levy it on their property; and that by written consent suffered a judgment against them and a sale of all their property in satisfaction of Hoffman's debt.

A summons was issued to Montgomery county against Goodpaster and Gray, and executed on them.

We will assume that a summons was issued, when the petition was filed, to Kenton county against Hoffman, and from time to time thereafter until the warning order was made against Hoffman, April 11, 1893. It appears that Hoffman during this time was a nonresident of the State, and known to be such by the plaintiff.

Section 3, article 2, chapter 44, General Statutes, is as follows: "Any number of persons interested may unite in the petition, but it shall not be necessary to make any persons defendants except the debtor and transferee, and the action and proceedings as to the mode of proving claims and otherwise shall be conducted as actions and proceedings for the settlement of the estate of deceased persons are now required to be conducted, as far as the same are applicable."

It is necessary that the debtor and the transferee shall be made parties to the action which seeks to have the debtor's estate assigned and distributed. (Savings Bank v. McAllister, 83 Ky., 151.)

The transfer, which inures to the benefit of creditors

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generally, is subject to the control of a court of equity upon the petition of any person interested, filed within six months after the act which operates as the transfer. It is not sufficient that the petition be filed within the six months, but the action must be commenced as required under section 39, Civil Code. (Cecil v. Howard, 10 Bush, 97.)

It is not commenced until a summons is issued or a warning order made thereon.

In Hoffman v. Brungs, &c., 83 Ky., 404, it was urged that the action was not commenced in the meaning of the statute because no summons was issued against the nonresident, Hoffman. A warning order had been made in proper time.

The court held that it was not necessary to have had issued a summons against Hoffman, and said: "The only summons known to the law by which he could have been brought before the court, where no actual service could be had, was adopted—that is, a warning order."

The court did not decide the question involved in this case as to whether a summons issued on the petition against the nonresident within six months from the act in contemplation of insolvency, etc., would have been sufficient to constitute a *lis pendens*. Had the plaintiff relied upon the summons in this case to bring Hoffman before the court, and it could never have been executed on Hoffman, then however much property Goodpaster & Co. may have had, other than that which Hoffman received by the judgment, the court was powerless to pass upon the question as to the effect of the acts, which it is claimed operated as a transfer of their property for the benefit of all their creditors, because the transferee was not before the court.

The question to be determined by the action was as to

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the effect of the acts of Goodpaster & Co., of which complaint was made. When the court decided that the acts of Goodpaster & Co. constituted a transfer of their property for the benefit of all their creditors, then Hoffman's liability for the property, the proceeds of which he received, was determined. He was interested in the trust estate, and the disposition of it, as well as the personal liability. He had such an interest in the estate and proceedings as enabled the plaintiff to bring him before the court by warning order.

The Code gave the plaintiff the means by which the nonresident, Hoffman, could be brought before the court in its action. (The one that was intended to enable a party to proceed against a non-resident.) In fact it was the only summons known to the law by which he could be brought before the court when actual service could not be had. From the nature of the proceedings, the questions should be speedily determined.

Where the plaintiff chose to have a summons issued against one known to it to be a nonresident it did so at its peril. When it failed to avail itself of the process which was intended to bring the nonresident before the court its suit was not commenced in time to have determined the question as to the effect of the act of which it complained. This conclusion renders it unnecessary to discuss the question as to whether the judgment in the United States Circuit Court would have been a bar to this action.

The judgment dismissing the petition is affirmed.

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CASE 43—PETITION ORDINARY—MAY 8.

Brent v. Long, et al.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. EJECTMENT—PLEADINGS.—Under the provisions of section 125 of the Civil Code, subsection 2, in an action to recover land the answer of the defendant "must state whether or not he claims it, or any part of it," and without such allegation, if a defendant claims the land he is sued for, he can not be allowed to avail himself, in defending the action, of any advantage derived from any claim he may have to the same.
2. PARTIES—OBJECTIONS FIRST MADE ON APPEAL.—Where a life estate is given to a married woman and her husband, with remainder to "the right heirs" of said husband and wife, on their death without issue, in a suit by the collateral heirs of the husband to recover the land, the collateral heirs of the wife were proper parties; but the defendant in this case having merely denied the plaintiff's allegations of ownership of the land, without asserting any claim or interest therein himself, can not for the first time in this court on appeal complain of said defect of parties.
3. "RIGHT HEIRS."—The expression "to the right heirs of said Henry and Harriet," means those to whom the property would pass by the law of descent.

THORNTON & KERR FOR APPELLANT.

1. The verdict was against the evidence and the overwhelming preponderance thereof.
2. The instructions given by the court predicate the right of recovery by appellees of the entire strip of land in question upon the theory that they were the heirs of Henry Long, when the evidence shows that one-half of the property never belonged to Henry Long, but passed under the Whitney deed to the "right heirs" of Harriet Long.
3. The first and controlling instruction in the case is so involved and confused, in its phraseology and construction, as to have made it difficult to understand and very misleading.

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Z. GIBBONS AND NELMS & BICKERS FOR APPELLEES.

1. The defendant's answer presented no defense to the action, as it failed to deny that the plaintiffs were entitled to any of the land, or to assert any interest or claim therein himself. (Sec. 125 Civil Code.)
2. There having been no plea of estoppel by defendant, he was entitled to no instruction on that question, and the court properly refused to give same.
3. This court will not reverse upon the ground that the verdict is contrary to the evidence unless it is plainly and palpably so. (Thompson v. Thompson, 93 Ky., 435.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The appellees sued the appellant in the Fayette Circuit Court to recover a small strip or parcel of land fronting on Third street, between Broadway and Mill streets in the city of Lexington, and described as running back at right angles with Third street "one hundred feet, more or less, to Frazier's line." They alleged that they were the owners and entitled to the possession of this strip or parcel of land, and that the appellant "now holds and has for the last three years wrongfully held said land, and kept plaintiffs out of possession thereof."

The chain of title under which they claimed the land was not set out in the petition, but the title papers introduced in evidence and the testimony of witnesses tended to establish the fact that the land sued for was a part of a lot that was conveyed by William W. Whitney to Samuel Long, by deed bearing date the 28th day of May, A. D., 1844, in trust for Henry Long and Harriet Long, his wife, with remainder over after their death, which deed will be more particularly referred to hereafter.

In his answer the appellant denied that the plaintiffs were "the owners or entitled to the possession of the strip,

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parcel or lot of land" described in the petition. This was followed by the further denial "that he *now holds* or for the last three years, or for any length of time, has *wrongfully held* the said land, or that he has *wrongfully kept the plaintiffs out of possession* thereof for any length of time." No claim was made by the appellant in his answer that he was the owner of the strip of land sued for, or of any part of it, or that he was for any reason entitled to the possession of it.

The Whitney deed of May 28, 1844, under which the appellees claim decribes the lot conveyed to Samuel Long in trust as follows: "Beginning on the southwest side of Third street, thirty-five feet from the lower side of an alley running from Third to New street, being the corner of what was formerly Henry Cassell's lot, thence with Third street thirty-five feet, more or less, towards Main Cross street, now Broadway; thence parallel with Broadway eighty feet, more or less, towards New street; thence parallel with New street thirty-five feet, more or less, to said Cassell's lot; thence with said Cassell's lot eighty feet, more or less, to the beginning."

The trust declared was in substance for the use and benefit of Harriet Long during her natural life, who was to be permitted uninterruptedly to use and enjoy it as her separate property during her life, with power in the trustee, on her request, to exchange or to sell it, and to re-invest the proceeds in other property upon the same trusts, etc., "and, after the said Harriet Long, remainder to said Henry Long for and during his natural life; and, after the death of said Henry, remainder to said Caroline Long and the heirs of the body of said Henry, of his said wife Harriet, begotten; or, in case of the death of said Caroline during the life of either the said Henry or the said Harriet, and in default of said

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heirs of the body of said Henry, *remainder to the right heirs of said Henry and Harriet* in fee simple forever."

Caroline Long, whose name appears in the foregoing extract, was named at the beginning of the deed as one of the beneficiaries, and was the only child of Harriet by a former husband, and died before the death of either said Henry or Harriet. Henry died before Harriet, without issue, and, although the latter married again after the death of Henry, she died without ever having had other issue besides Caroline.

By the deeds offered in evidence the title to this lot was traced regularly back to Thomas January, who, by deed bearing date the 2d day of December, A. D., 1817, conveyed it to Stephens & Winslow, every deed giving "thirty-five feet, *more or less*," as the frontage of the lot on Third street, except the last-named deed, which gave it as "*thirty-five feet.*"

The testimony also showed that the appellant was the owner of a lot adjoining the lot claimed by the appellees under the chain of title running back, as stated, to Thomas January, and lying between the said lot and Broadway, and the deeds in the chain of his title describe his lot as fronting eighty feet on Broadway, and running back from Broadway, with Third street, towards Mill street *one hundred feet.* His title is traced back to the said Thomas January, who, by deed dated the 12th day of November, A. D., 1821, conveyed the said lot to William Macbean.

It appears from the face of this deed that the grantor, several years before it was made, had given his bond to the grantee for a title to this and another lot embraced in the deed, as the statement is made that the deed was executed "in conformity with my bond to said Macbean, dated 14th January, 1814."

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The evidence further shows that the appellant purchased this lot during the lifetime of Harriet Long, and while she was in possession of the lot claimed by the appellees, and that, in enclosing his lot, in order to get the depth of one hundred feet called for in his deed, he took within his enclosure a few feet of ground that had been within the enclosure of and that was claimed by Harriet Long, and that are now claimed by the appellees as part of the lot embraced in the deeds from Thomas January in 1817, down to that of William W. Whitney in 1844.

As we have seen under the Whitney deed the "right heirs" of Henry and Harriet Long—that is, those who under the law of descent would inherit the property of each of them in case he or she died intestate—were made the ultimate remaindermen, contingent upon the death of Caroline, during the life of either of them, and upon the death of Henry without heirs of his body. Consequently, at the death of Harriet, the last survivor, Caroline having previously died, and Henry having left no heirs of his body, the title to the lot vested absolutely in their "right heirs." The evidence in the case tended to show, and there was no conflict on that question, that the appellees were the only surviving collateral heirs of Henry Long; but there was no testimony showing that any of the appellees were the collateral heirs of Harriet, who died in the year 1887, or who were her heirs.

The issues raised and presented by the pleadings which we have quoted were narrowed down to the questions:

1st. Whether the appellees had any title under which they had the right to claim the possession of the strip of ground sued for; and,

2d. Whether the appellant was in possession of it, or of any part of it.

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No question was raised in the pleadings, or at all so far as the record shows, as to any defect of parties, nor does it appear that any resistance was made in the court below to a recovery by the appellees on the ground that the "right heirs" of Harriet Long were not joined as plaintiffs with the appellees.

At the conclusion of the testimony the court, on its own motion, gave four instructions to the jury, all of which were excepted to by the appellant. In the first instruction the court submitted in proper form the question of the relation of the appellees as heirs of Henry Long, and told the jury in substance that if the heirship was established by the evidence, and if the strip of land in controversy was embraced in the said deed from Thomas January to Stephens & Winslow, and if the appellees derived their title to the land sued for from those claiming under the latter, and if the appellees, or those, or any of them under whom they claimed, were in the possession of the said land at the time the appellant enclosed it, or if the land in controversy was not embraced in the said deed from Thomas January to Stephens & Winslow, but was embraced in the deed from said January to William Macbean, and that the appellees, or those under whom they claimed had the land in controversy in their possession and claimed it as their own continuously, notoriously and uninterruptedly for a period of fifteen years before the appellant took possession of it, that the law was for the appellees, and that they should so find.

In the second instruction the jury were told that they should find for the appellant, unless they believed from the evidence that the appellees were entitled to recover under the state of facts submitted in the first instruction.

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They were then told that if they found for appellees they should state in their verdict the amount of land they were entitled to recover, and find for them a sum which would fairly compensate for being deprived of the land by appellant from the time it was wrongfully taken to the date of the trial. By the last instruction the jury were directed, in case they found for appellant, to so state, and no more.

The testimony was conflicting as to the number of feet of ground claimed by appellees that were enclosed by the appellant as part of his lot, but under the foregoing instructions the jury in their verdict found the number to be three feet and three and one-half inches; and, as their finding on that question seems to be sustained by a preponderance of the evidence, the verdict ought not to be disturbed on account of the conflicting testimony.

The material question to be decided is as to the correctness of the first instruction. Unquestionably if Harriet, who was the wife of the said Henry Long, and who survived him, left heirs surviving her, they became entitled at her death, under the Whitney deed, as joint tenants with the appellees to an interest in the lot embraced in said deed, including the strip of ground sued for in this action, if it was a part of said lot and embraced in the deed.

It is insisted that the heirs of Harriet ought to have been joined as plaintiffs in the action with appellees; but, no objection having been made in the court below on account of the failure to join them, we hold that, although they would have been proper parties to the action upon the issues made in the pleadings, the attitude of the appellant is such that he can not be allowed to make the objection for the first time in this court. The Civil Code (section 125, subsection 2) provides that, in an action for the recovery

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of land, "the answer of the defendant must state *whether or not he claims it, or any part of it.*" This requirement, we hold, is imperative, the defendant "*must state*," etc.

In Bailey, &c. v. McConnell, &c., 12 Ky. Law Rep.,—' which was an action to recover land, this court held that the answer of the defendants was defective, because it did not contain the statement required by the Code above quoted. Without such statement, if a defendant claims the land he is sued for, he can not be allowed to avail himself, in defending the action, of any advantage derived from any claim he may have to the land. He can not be allowed to assert his title to the land in such an action as against the conflicting claim of the plaintiff on the mere denial that the plaintiff's title or claim of right of possession is good. In this case the appellant, in his answer, saw proper only to deny the right and title of the appellees to the land sued for and that he then held it. The denial that he had wrongfully held the land or that he had wrongfully kept the appellees out of possession for the time alleged in the petition, or for any length of time, can not be considered as a sufficient denial of anything alleged in the petition, and no more can it be considered an assertion of his right to the land. So that, upon the issues made, the appellees could not be held to prove anything more than that they had such a title to the land they were suing for, as would give them the right of possession, and that the appellant was in possession of the land they claimed in the action. If the evidence established their right to the land as right heirs of Henry Long under the Whitney deed, they certainly had the right of possession as against a wrongdoer, even though they were joint tenants with the right heirs of Harriet. It was upon this view, evidently,

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that the first instruction was based, and we hold that, upon the issues made in the action, the court did not err in giving it, and that the substantial rights of the appellant were not prejudiced by the fact that the heirs of Harriet were not made parties to the action. In this view of the case the other instructions that were given are free from error.

Certain instructions were asked for by the appellant and refused by the court, and this is also complained of as error. They are not numbered, and, therefore, must be considered as a whole.

After carefully examining them we are not able to see that there is anything, either in the pleadings or the evidence, that would have justified the court in giving them. What was requested in respect to an estoppel would have been clearly erroneous, because an estoppel was not set up in the answer as a defense to the action, and also because there was no evidence upon which to base it. The proposed instruction as to what would not have been evidence sufficient to establish the true line between the lots of plaintiffs and the defendant would have been error, if for no other reason, that it would have been making the court, instead of the jury, the judge of the weight and effect of the evidence. And then it would have been improper to instruct the jury with regard to the abstract proposition of law that, where both parties to an action for the recovery of land claimed title through the same person or from the same source, neither party is required "to show title back of that person" or source, and as to what would be the result of that proposition of law in this action as bearing on the rights of the parties to the action, because that would be submitting the question of appellant's title to the jury, which, as we have seen, could not be permitted upon the issues made by the pleadings.

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What we have held with reference to the first instruction is decisive of this case, and the alleged errors with regard to the testimony allowed or refused need not be noticed; and, finding no error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

CASE 44—PETITION ORDINARY TRANSFERRED TO EQUITY—MAY 9.

Oil City Land and Improvement Co. v. Porter.

APPEAL FROM BARREN CIRCUIT COURT.

1. CORPORATIONS—SUBSCRIPTIONS OF STOCK IN.—It will be presumed that one who had agreed to take stock in a corporation, and subsequently executed his notes therefor knew when he executed his notes the provisions of the charter or articles of corporation of the company in which his subscription was made, and of which he thus became a member; and he must, therefore, be charged with knowledge that the articles of incorporation authorized the purchase or subscription of stock in other corporations. And this rule applies as well to charters formed under the general law as to those granted directly by the legislature.
2. FALSE REPRESENTATIONS—FRAUD.—It is a general rule when one is induced to take stock in a corporation by false representations of an agent thereof, or by the fraudulent concealment of material facts from him, touching the condition of the company, the contract is voidable at the option of the subscriber; but such representations or concealments must be concerning facts not within the knowledge of the subscriber. Where they touch the powers of a corporation under its charter, they are matters of law and will not vitiate the subscription.

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STONE & SUDDUTH FOR APPELLANT.

1. The evidence taken as a whole, and in connection with all the facts and circumstances, is decidedly against the contention of appellee that material facts were fraudulently concealed from him.
2. The appellee was bound to take notice of every provision and power set out and provided for in the articles of incorporation. They formed a part of the contract whereby he became a stockholder in the company. (Cook on Stock and Stockholders, vol. 1, p. 211.)
3. When the agent of a corporation makes false statements and misrepresentations in relation to matters open to the investigation of both parties, intending thereby to induce persons to subscribe for the stock, one so subscribing has no right to rely upon them, and if he does, it will be no ground for cancelling the subscription. (Waterman on Corporations, vol. 2, sec. 193, p. 73; 23 Ind., 572; 7 Blackford, 329; 95 U. S., 667; 34 Miss., 255; 17 Beavan, 87; 79 Ky., 552.)
4. The misrepresentations of an agent of a corporation as to its rights, powers or privileges under its charter, is not ground for cancellation of a subscription to its stock. (Parker v. Thomas, 19 Ind., 219.)

LEWIS McQUOWN FOR APPELLEE.

1. The evidence is conflicting as to whether Ritter told Porter of the intention to invest in the stock of the other company, and the chancellor below found on this issue for appellee, and that finding under the well settled rule of this court, should not be disturbed.
2. Corporations are chargeable with the fraudulent representations or suppressions of truth of their agents, without regard to whether the agent exceeds his authority or conceals its limitations. (Crumbe v. U. S. Min. Co., 7 Gratt. (Va.), 353.)
3. The execution of the notes was not a ratification of the agreement to subscribe stock, for before one can ratify an act he must know all the facts.

E. W. HINES ON SAME SIDE.

1. Even though appellee may at the time he executed the notes sued on have been chargeable with notice of the provisions of the articles of incorporation, these did not give him notice of the fact that there was at the time he subscribed an agreement to take a given number of shares of stock in another corporation, and he had no means of ascertaining this fact.

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2. When the notes were executed the appellee had no *actual* notice of the concealed fact, and, consequently, there could have been no ratification. Constructive notice is not sufficient.
3. The well established rule is that a corporation can not claim or retain the benefit of a subscription which has been obtained through the fraud of agents, it matters not whether the agents had authority or exceeded his authority or concealed its limitations. And this rule applies alike whether there was false representation, or fraudulent concealment of facts. (Cook on Stock and Stockholders, secs. 140, 147 and 148.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The appeal in this case was certified to this court by the Superior Court, which court had reversed a judgment rendered by the Barren Circuit Court in an action in which the appellant company was plaintiff against the appellee upon two promissory notes executed by the appellee for stock in the appellant company, for which he had subscribed or agreed to take. The company was incorporated and organized in November, 1889, under chapter 56 of the General Statutes, and the articles of incorporation were recorded in the office of the clerk of the county court of Jefferson county.

The general nature of the business of the corporation, as provided in the articles, was to buy, lease, sell and improve lands, and to acquire timber, mineral, oil and natural gas privileges. Besides, by one of the provisions of the articles, the company was authorized *to subscribe for stock in other companies or corporations.* By a prospectus or "subscription list," bearing date the 16th day of October, 1889, many of the promoters and proposed stockholders of the company then in contemplation pledged themselves respectively to take certain amounts of the capital stock, which was to be fixed at $100,000, in shares of a par value of $100 per share, but which the subscribers were to take and pay

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for at the rate of $25 per share. This paper contained the following paragraph: "It is proposed to organize a town company, purchase these lands and build a town. The Kentucky Southern Oil and Gas Co. have agreed to locate within ninety days, a large refinery on the property, this company agreeing to donate ten acres for this purpose, *besides subscribing for one thousand shares of the said Kentucky Southern Oil and Gas Co. at $5 per share to be paid upon completion of said refinery.*"

The lands which it was proposed to purchase for the contemplated town site were situated in Barren county, on the railroad between Glasgow Junction and the city of Glasgow. The lands were eventually purchased and laid off into lots, the oil refinery built on the land donated for the purpose, and one thousand shares of the Kentucky Southern Oil and Gas Co. taken by the appellant company, and paid for at $5 per share, with the money received from the subscribers to the capital stock of the appellant company.

About the 19th of October, 1889, three days after the date of the "subscription list" above referred to the appellee through the solicitation of Judge Ritter, then of Barren county, and one of the promoters of the organization of the appellant company, and a subscriber to said preliminary or subscription paper, agreed to take forty shares of the stock of the proposed company, which was communicated to one of the promoters in Louisville by Ritter by a letter written by him, and the name of the appellee was signed to the paper by the person to whom the letter of Ritter was addressed, thus apparently pledging the appellee in writing, in advance of the actual incorporation and organization of the company, to take and pay for forty shares of the stock of the company at $5 per share.

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The proof does not show that the appellee authorized, either verbally or in writing, the signing of his name to this paper, and there is nothing in the record to show that he even knew that it was expected that he would sign the paper. But it satisfactorily appears from the evidence that he recognized that he was pledged to take forty shares of the stock of the company on the terms named, for when it was necessary that there should be a meeting of those who were pledged to take the stock for the purpose of organizing the company, which meeting was called for and held on the 4th day of November, 1889, he verbally authorized Ritter, who attended the meeting at Louisville, to represent him and vote his stock, for which he was pledged, in the organization of the company under the articles of incorporation, which it seems were formulated and recorded on the 2d day of November. And afterwards, in the month of January, 1890, he executed his three notes to the organized company for $333.33 1-3 each, covering the amount of stock which he had verbally agreed to take, one of which notes he subsequently paid off. Failing to pay the other two notes after they fell due, the company commenced action on both of them in the Barren Circuit Court on the 18th day of September, 1891.

Defense was made to the action on the alleged ground that he was not aware, when he told Ritter that he would take forty shares of the stock of the company, that it was proposed to subscribe for the one thousand shares of the stock of the Kentucky Southern Oil and Gas Co., which fact he averred was fraudulently concealed from him by Ritter, and he alleged that the expenditure of $5,000 of the cash of the appellant company for the stock of said Oil and Gas Co. was made without his knowledge or consent,

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and was unlawful and without authority, and was a misappropriation of the assets of the appellant company to the extent of $5,000. It was also alleged that the Kentucky Southern Oil and Gas Co. had become insolvent, which was true, and that the appellant company was also insolvent which latter insolvency was brought about principally by the alleged unauthorized expenditure of the $5,000 aforesaid, while it was claimed in behalf of the appellant company that it was necessary that it should recover the money due on the notes of appellee in order that the company might be able to pay its debts. The case having been transferred to equity, the appellee sought to have a receiver appointed and having made his answer a cross-petition against the directors of the company, he prayed that they might be compelled to account for the said $5,000, that the affairs of the company might be settled up, and the company restrained from collecting the notes sued on.

The allegations of fraudulent concealment and of unlawful and unauthorized expenditure of the money of the appellant company were denied both by the company and the defendants in the cross petition. These were the principal matters in issue, and there was much testimony taken, especially on the charge of fraud. But while the testimony was conflicting the court below found on the issues made in favor of the appellee, and by its judgment cancelled the appellee's subscription to the capital stock of the appellant company, and dismissed the petition of the plaintiff and the cross petition against the directors, but gave a judgment over against the appellant company for the amount paid by the appellee on the note paid by him for the one-third of his subscription.

Conceding that the appellee never saw the subscription

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paper to which his name was signed as above stated before he was sued on the notes, and that Ritter did not tell him that it was the purpose of the company when organized to subscribe for one thousand shares of the Kentucky Southern Oil and Gas Co., and that he even intentionally concealed that purpose from him, still it would not follow that the appellee was entitled to have the notes he executed for the stock he agreed to take, or his subscription for the stock, which was made binding on him when he executed the notes, if not before, cancelled, or to have the money he paid on the first note repaid to him by the company. There is not the slightest evidence in the record that Ritter was the agent of any of the promoters of the proposed corporation at the time he solicited the appellee's subscription, or that any of the other promoters or subscribers knew that any concealment had been made, if indeed it was purposely made by Ritter, of the fact complained of by the appellee. He was not legally bound on the subscription paper, because it does not appear that any one had authority from him to sign his name to it, and if he had been thus bound it would have been only by reason of the fact that that it was a mutual undertaking on the part of all of the subscribers. But when the company was regularly incorporated and its organization completed, there was a different condition of affairs. It was not until nearly two months after this that the appellee did actually subscribe for the stock which he had previously agreed to take, and thus became legally bound to the body corporate for his subscription. There is no evidence that the company or any of its officers or agents deceived him, or induced him by any fraudulent means to execute his notes for the price of the stock, or to pay for any part of it. It must be presumed

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that at the time he executed the notes and paid one of them he knew the provisions of the charter or articles of incorporation of the company under which his subscription was made and of which he thus became a member. (Wight v. Shelby R. R. Co., 16 B. Monroe, 4; Parks v. R. R. Co., 23 Ind., 572; Jenkins v. Prewitt, 7 Blackford, 329; Walker v. R. R. Co., 34 Miss., 255; Ellison v. Mobile & Ohio R. R. Co., 36 Miss., 572.)

He must, therefore be charged with knowledge that the articles of incorporation contained the provision which has been referred to, and which authorized the purchase or subscription for stock in other corporations. And we hold that this applies as well to charters formed under the general law authorizing the organization of corporations as to those enacted directly by the Legislature. The rule on this subject is well stated in the opinion of the Superior Court in the following language: "It is a general rule that when a person is induced to become a stockholder of one of these associations by false representations fraudulently made by an agent thereof or by the fraudulent concealment of any material facts touching the condition of the company, the contract is voidable at the option of the subscriber, and may be annulled by him. Such fraudulent representations or concealments, however, must be concerning facts not within the knowledge of the subscriber. Where they touch the powers of a corporation under its charter they are matters of law and will not vitiate the subscription. Where a party makes a contract he must at his peril inform himself of the legal consequences of his undertaking. So a subscriber for shares in a corporation must at his peril inform himself with regard to the provisions of its charter or of its articles of incorporation."

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The appellee has failed to show a state of fact that would authorize the court to decree the cancellation of his contract of subscription for the stock of the appellant company.

The judgment of the lower court cancelling his subscription, dismissing the petition and recovering against the appellant in favor of the appellee the amount of the note paid by him for one-third of his said subscription is, therefore, reversed and cause remanded, with directions to render a judgment against the appellee for the amount due on the two notes sued on. And if further proceedings are necessary to settle the affairs of the appellant company they may be had, but to be consistent with this opinion.

CASE 45—PETITION ORDINARY—MAY 14.

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Mt. Sterling National Bank v. Green.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. REFUSAL BY BANK TO PAY CHECK—LIEN ON DEPOSITS.—A bank is obliged to pay the checks, drafts and orders of a depositor, so long as it has in its possession funds of his sufficient to do so, and which are not encumbered by the attaching of an earlier lien in its favor, and if it fails or refuses to do so without sufficient justification, the depositor may have his action for damages against it.
2. APPROPRIATION BY BANK OF DEPOSIT.—Where the depositor owes the bank a debt, past due, which is larger in amount than his deposit, it is not necessary for the bank upon the presentation of the depositor's check, to appropriate the deposit and apply it as a credit on his debt; the simple question being upon its presenta-

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tion whether the bank had a right to refuse payment of the same, and if it had, its refusal to honor the check was a sufficient appropriation.

TYLER & APPERSON FOR APPELLANT.

(No brief in the record.)

A. T. WOOD, B. F. DAY AND Z. T. YOUNG FOR APPELLEE.

(No brief in the record.)

C. P. CHENAULT FOR APPELLEE.

1. The technical defect in the petition, if any, was cured by the verdict; the plaintiff could not in the very nature of things, have recovered unless he had shown that the fund was subject to his check. (Rogers v. Felton, Rec'r, 17 Ky. L. R., 725; Fraze v. Commonwealth, 16 Ky. L. R., 29.)
2. The *right* to appropriate a fund is not in fact an appropriation thereof; and it was the duty of the bank to have appropriated the fund to the payment of appellee's note, upon the presentation of the check, if not before.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

James Green, brought this action to recover of the Mt. Sterling National Bank $5,000 damages, his cause thereof being stated substantially as follows: That October 17, 1892, he drew his check on defendant for $1,000, payable to the order of Sally A. Bratton, which was October 27, 1892, duly presented for payment; but that although when said check was drawn and delivered, as also when it was presented by Sally A. Bratton for payment, plaintiff had ample money on deposit and to his credit in the bank to pay said check, defendant refused to pay and caused the check to be protested, and thereby injured plaintiff's credit and standing in the community as an honorable business man to his great damage, etc.

As ground of defense, defendant stated in its answer

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substantially that December 2, 1891, plaintiff executed and delivered to it his promissory note, agreeing to pay six months thereafter $5,671.31, which became due June 2, 1892; that October 27, 1892, said note was still due and unpaid, and was for largely more than plaintiff then had on deposit and to his credit in defendant's bank; that because it had a lien upon and right of set-off against amount of plaintiff's credit on that day as depositor, defendant refused to pay said check and retained the amount of his deposit until October 31, 1892, when payment was actually made by him of the note, and then defendant released its lien and plaintiff drew checks in favor of other parties for the entire amount of his deposit, which were paid as presented.

To that answer a general demurrer was filed and sustained, demurrer to the petition having been previously overruled, and verdict and judgment being subsequently rendered in favor of plaintiff for $2,000, the defendant appealed.

It seems to be well settled that the obligation of a bank to pay checks, drafts and orders of a depositor so long as it has in its possession funds of his sufficient to do so, and which are not incumbered by the attaching of an earlier lien in favor of the bank, and the reciprocal right of the depositor to have them paid are so far substantial, that if the bank refuses without sufficient justification to pay the check of a customer the customer has his action for damages against the bank. (Morse on Bank and Banking, section 458.)

As, therefore, the statements in the petition constitute *prima facie* a cause of action, the demurrer to it was properly overruled.

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But in the language of the Masonic Savings Bank v. Bang's adm'r, 8 Ky. Law Rep., 16, "The right of a bank to a general lien on the money and funds of the depositor in its vaults for the payment of the balance of the general account of the depositor is recognized by all the elementary books of bank and banking and sustained by an unbroken line of American decisions."

In Pursiful v. Pineville Bank, 17 Ky. Law Rep., 38, it is said by this court that there is no difference of opinion as to the right of a bank under the doctrine of set-off to have applied to payment of a note held by it against a depositor unappropriated funds he may have deposited in the bank to his credit.

As aptly and correctly said in Herndon v. The Louisville Banking Co., decided by the Superior Court, 10 Ky. Law Rep., 584, "the relation between the bank and the depositor is that of debtor and creditor, and as long as it exists the bank must honor the drafts and checks of the depositor in the order in which they are presented to the extent of the deposit, but when on account of any legitimate transaction between the parties the relation is shifted and the balance of the account is against the depositor, it seems to us that upon principle, the bank should not be required to respond to the demand of the holder of the check, which was drawn before this altered condition of affairs, but of which the bank had no notice until afterward."

In this case, however, the depositor, prior to and at the date of the check, was indebted to the bank by a promissory note past due, an amount greater than what he had on deposit, and, therefore, occupied the relative attitude of debtor.

In sustaining the demurrer to the answer the lower court

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expressed an opinion that defendant had a lien on the deposit of plaintiff, and the right at the time of presentation of the check by the holder for payment to appropriate the entire amount then on deposit belonging to plaintiff to the payment of said note due from plaintiff to defendant. But the demurrer to the answer was nevertheless sustained, because in the language of the court the defendant failed on the presentation of the check to appropriate said deposit and apply the same as a credit on the said note and thereby released its lien.

It seems to us the reason for that decision is not sufficient. The question is whether at the time the check was presented the bank had the right to refuse payment. If it did, then its simple refusal to honor the check was proper exercise of that right, and all the appropriation needed for that purpose.

In our opinion the facts stated in the answer constitute sufficient justification of the bank refusing to pay the check in question and *prima facie* sufficient ground of defense to the action. And as this record stands defendant was, on the pleadings, entitled to judgment. We need not refer to the instructions further than to say having been given upon incorrect hypothesis they are necessarily erroneous.

For the primary error in sustaining demurrer to the answer the judgment is reversed and cause remanded for new trial consistent with this opinion.

Judge Hazelrigg not sitting.

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CASE 46—PETITION ORDINARY—MAY 15.

Myers, Administrator v. Douglass.

APPEAL FROM LINCOLN CIRCUIT COURT.

1. VERIFICATION—WAIVER.—While section 473 of the Kentucky Statutes, provides that "the execution of a writing on which a suit or defense is founded, or its assignment, shall only be denied by answer or other pleading verified by oath," yet the Civil Code, section 138, provides when the objection for want of verification must be made, and if it is not made at that time, it is waived.

HILL & MCROBERTS FOR APPELLANT.

1. The paper styled an answer was not an answer, because under the express terms of section 473, Kentucky Statutes, it must be sworn to before it becomes such; and appellant's right to move the court for a judgment, notwithstanding the verdict, could not have been waived. That motion should surely have been sustained. (Ky. Stats., sec. 473; Civil Code, sec. 386.)
2. The plea of *non est factum* is required always to be sworn to, because the courts would, in favor of innocence, presume a paper purporting to be signed by a party to be charged on it, was genuine until it was attacked by plea under oath. (Trustees Orphan School v. Fleming, 10 Bush, 237.)

W. G. WELCH AND R. C. WARREN FOR APPELLEE.

1. The jury had been sworn, all the testimony had been adduced, and the defendant sworn and had testified under oath that he did not execute the note, and it was then too late to make the objection, and it had thereby been waived. (Civil Code, sec 138, 70 Ill., 41.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

This action was on a promissory note. The plea was *non est factum*. After a trial and verdict for the defendant

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the plaintiff moved the court for a judgment for him, notwithstanding the verdict, because the answer was not verified.

Unitl after the verdict no question seems to have been made that there was no verification of the answer. There is no question made nor could there be that the answer did not contain facts sufficient to constitute a good plea of *non est factum.*

Section 473, Kentucky Statutes, provides that "the execution of a writing on which a suit or defense is founded or its assignment shall only be denied by answer or other pleading verified by oath."

It is obvious that the answer should have been verified by oath. The court, on having its attention called to the want of verification of the answer, would have refused to allow it to be filed; or, having permitted it to be filed without verification, then certainly on defendant's refusal to verify it would have authorized the court to have stricken it from the record. There was no objection to the filng of the answer, nor was there any motion to require the defendant to verify it..

Section 138, Civil Code of Practice, provides that "no objection shall be taken after the commencement of the trial to any pleading for the want of or a defect in the verification."

While the statute requires the verification of the answer, yet the Code provides when the objection shall be made. If not then made it is waived.

The judgment is affirmed.

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CASE 47—PETITION EQUITY—MAY 19.

Pinckard, Receiver v. Davis.

APPEAL FROM BRACKEN CIRCUIT COURT.

1. AUTHORITY OF CITY MARSHAL TO EXECUTE PROCESS FROM CIRCUIT COURT.—The provision in the charter of towns of the fifth class (section 3629, Kentucky Statutes), which says in speaking of the city marshal that "he shall, and is hereby authorized to execute and return all process issued, and directed to him by any legal authority," only means process issued and directed by municipal authority; and does not authorize him to serve process from the circuit court, or the clerk of that court to direct the same to him.

H. P. WILLIS FOR APPELLANT.

1. A receiver appointed in another State, will be permitted as a matter of comity to sue in the courts of this State. (Lawson's Rights, Remedies and Practice, vol. 7, p. 6102; Am. & Eng. Enc. of Law, vol. 20, p. 242 and cases there cited.)
2. The motion by the appellees to quash the summons came too late, as it was made long after they had entered appearance to the action.
3. The clerk was authorized to direct the process to the marshal, and the marshal had a right to execute the same. (Sec. 3629, Kentucky Stats.)

THOS. H. HINES FOR APPELLEES.

1. Section 667 of the Civil Code, designates the officers to whom process may be directed, and by whom it may be served. An attachment executed by any officer other than those named therein is worthless. (Sec. 667, Civil Code.)
2. While the city marshal is authorized by section 3629, Kentucky Statutes, to execute such process as may be directed to him, that has reference only to such process as may issue from the municipality of which he is an officer.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

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In an action in the circuit court an order of attachment was issued by the clerk and directed to the marshal of the town of Augusta—a town of the fifth class. The process was duly served on the garnishee, but in a contest between the attaching creditor and a subsequent claimant of the fund sought to be attached, the trial court held the service ineffectual to create a lien, and adjudged the fund to the junior claimant.

On appeal it is contended that while the provisions of the Code (subsection 2, section 667) do not designate such an officer as one to whom such process may be directed, yet power to execute it is conferred on him by section 3629 of the Kentucky Statutes (charter of town of the fifth class), provided the process be directed to him. That section provides that the department of the police of said city shall be under the direction and control of the city marshal, and for the suppression of any riot, public tumult, etc., he shall have the powers that are conferred upon sheriffs by the laws of the State, and shall in all respects be entitled to the same protection, and then follows this language, which is that relied on by appellant: "He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority."

Then follows further regulations with respect to the duties of the marshal in the police court and in the city. It seems to us that the power to execute process conferred by the language quoted must be restricted to process issued and directed by municipal authority. The marshal is an officer of the city government, an appointee of the council, and sustains somewhat the same relation to the city and its governmental affairs as the sheriff does to the county. We can not believe this statute intended to add his name

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to the list of officers authorized by the Code to execute process and orders of attachment in the circuit court.

As there was no authority on the part of the marshal to execute the process, there was none on the part of the clerk to issue and direct it to him, and its service created no lien.

Judgment affirmed.

CASE 48—PETITION EQUITY—MAY 19.

Swearingen v. Abbott, et al.

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APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. DECRETAL SALE OF INFANT'S REAL ESTATE.—In an action under the provisions of section 490 of the Civil Code, for the sale of infant's real estate, owned jointly with others, it must not only appear that the property was indivisible, but that the infant had vested estate and was in possession.

BULLITT & SHEILD FOR APPELLANT.

1. Section 490 of the Civil Code requires that the estate owned by the infant in such actions as this must not only be a vested one, but "in possession," and without that the court had no jurisdiction to order the sale. (Malone v. Conn, 95 Ky., 95.)
2. The answers of the life tenant and the joint owner should not be construed as equivalent to their uniting in the petition; an answer can not confer jurisdiction where the court did not obtain it by the original petition; and, besides, the answers do not bring this case within the statute, as the life-tenant had no right to sue his children to obtain a sale. (Malone v. Conn, *supra*.)
3. In such an action jurisdiction can not be conferred by the cross-

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petition of the life-tenant against the remaindermen to have the property sold for debt under section 489, Civil Code, as such an action must be either an independent action, or a cross-petition in a suit wherein jurisdiction has already been obtained.

CHAS. M. LINDSEY ON SAME SIDE.

(No brief in the record.)

GIBSON & MARSHALL AND HUMPHREY & DAVIE FOR APPELLEES.

(No brief in the record.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

While it is manifest the property in this case is indivisible, and perhaps it is to the interest of the infants that it should be sold, still the proceedings do not follow the provisions of the Code authorizing the sale of infant's real estate.

It is true the owner of three-fourths of the realty consents to the sale, and the life tenant by cross petition is seeking to subject the realty to the satisfaction of a lien, yet the infants by their next friend could not bring the action because they were not in possession, and although with a vested estate the possession is with the life tenant and the other joint owner. (Malone v. Conn., 95 Ky., 93.)

This is not a sale for debt within section 489 of the Code, or a proceeding under 491, but an attempt to sell under 490, because the estate was vested in the infants. Whether or not the title passed by reason of the cross petition of the father is a question of doubt; but the purchaser is complaining, and it is not only proper but essential that these statutes regulating the sale of infants' realty should be complied with. If the father has a lien, let him enforce it; or, if the joint tenant wants it sold, let her bring the

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action, and not by the next friend of the infants without an averment bringing the case within either of the sections of the Code under which the realty of infants can be sold.

Section 490 not only requires that the estate should be vested, but the possession must be with the infants. Here they have no right to enter because of the life estate in the father.

Reversed and remanded, with directions to set aside the sale and dismiss the petition.

CASE 49—PETITION EQUITY—MAY 19.

Bedford, et al. v. Bedford's Administrator, et al.

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APPEAL FROM LEWIS CIRCUIT COURT.

1. WILLS—RULE OF CONSTRUCTION.—The cardinal rule, which is of universal application, in the construction of wills, is that the intention of the testator as gathered from the instrument as a whole, must prevail, if not opposed to some positive provision of the law or some general principle of public policy.
2. CONSTRUCTION OF DEVISE.—A devise by a testator of land to his daughter with the following limitations: "The property bequeathed to my daughter, Elizabeth, to go to her child or children at her death, or if she and her son Robert die without children, the estate to revert to her four brothers now living, their heirs and assigns forever," must be construed as intending that the land so devised should revert to her brothers only if both the daughter and her son should die without issue previous to the death of the testator; and the daughter having survived the testator, on her death her son was invested with absolute title.

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3. CONTINGENT DEVISE.—Where a testator provides in one clause of his will "and after my death my will and desire is that the same be equally divided between my five children, their heirs and assigns forever," and in a subsequent clause says, "It is my will and desire that in case of the death of my daughter, Elizabeth (she being one of the five children), before her son shall have arrived at the years of maturity, and should her son die without issue, that the property bequeathed shall revert and be merged in the estate;" both of the contingencies named in the last clause must happen before the property reverts to the estate; and the daughter having survived until her son attained his majority, became invested with absolute title to the land so devised.
4. CONSTRUCTION OF CODICIL.—Where the terms of a will clearly give an estate, the words of a codicil must manifest an equally clear intent to revoke or change it, before they will be construed to have such an effect.
5. RESIDUARY CLAUSE—CONSTRUCTION OF.—The restrictions in a residuary clause of a will do not operate upon the property embraced in the specific devises to the testator's children, but only upon the property passing to them under the residuary clause.
6. CONSTRUCTION OF DEVISE.—A provision by a testator in a codicil to his will that his wife should have for life all his land not specifically devised to his children, and that at her death all the property left to her for life should be divided into five equal parts, "four parts to go to my four sons and their heirs forever, and the other one-fifth I bequeath to my daughter," invests the daughter with the absolute title to her part thereof, just as it does the others..
7. CHARITABLE TRUST—SUFFICIENTLY DEFINITE.—A devise by a testatrix of lands to her son for life, and providing that if he died without children "I desire all my lands to be sold, and the money arising from said sales I give and bequeath to the State of Kentucky, in trust forever, for the use and benefit of the children of the State. I desire that the money constitute a permanent school fund, and the interest from this fund be appropriated annually towards the education of the children of this State," created a charitable trust, definite as to the trustee and the objects of the charity, and not invalid because of the indefinite number of the beneficiaries.

SAMUEL J. PUGH AND WM. GOEBEL FOR SUSAN M. BEDFORD.

1. The two-hundred acre tract of land in Nicholas county should have been adjudged to belong to Susan M. Bedford, because under the

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will of Geo. M. Bedinger a life estate therein passed to his daughter, Elizabeth M. Bedford, and the remainder in fee therein to Robert Bedford, who devised his entire estate to Susan M. Bedford.

2. The provision in Bedinger's will in devising land to his daughter that "if she and her son, Robert, die without children the estate to revert to her four brothers, requires the happening of two contingencies before the reversion can take place: First, the death of the daughter without child surviving her; second, the death of her son, Robert, without child surviving him. The daughter having died leaving her son Robert surviving her, he takes the fee-simple title to the land.
3. The language of a codicil in declaring the interests of devisees in real estate, relates only to the property disposed of by the codicil.
4. The residuary clause of the will which provides that "the residue of my estate of every description, with all reversions, I will and bequeath to my five living children equally, and should any of them die without issue before they have disposed of their interest in any realty thus devised, their portion to the others living or having issue, their heirs or assigns forever," should be construed to vest a life-estate in the residuary estate in each of the five children in equal portions, with power of alienation; and that the remainder in fee was vested in the issue of the first takers, and upon failure of such issue, in the survivors of the first takers or their issue.
5. Although the provisions in the will that "the property bequeathed to my daughter, Elizabeth M. Bedford, to go to her child or children at her death" occurs in the will after the specific devise to the daughter and before the residuary provision, as the will was inartifically drawn, the location in the will of this provision should be considered of little importance, and it should be held to apply to the residuary estate as well as the specific estate devised to her.
6. The provision in the will of Elizabeth M. Bedford, which provides that in certain contingencies all of her property should go "to the State of Kentucky, in trust, that the said State will forever hold the same for the use and benefit of the children of the State," etc., is invalid because of its indefiniteness, and that devise being invalid the same passed by descent to Robert Bedford, even if his mother did hold the fee-simple title to the property. (Leeds v. Shaw, 82 Ky., 80; Peynado v. Peynado, 82 Ky., 5; Moore v. Moore, 4 Dana, 354; Penick v. Thorn, 90 Ky., 665; Russell v. Allen, 107 U. S., 163; Vidal v. Girard, 2 How., 127.)

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GEO. T. HALBERT AND WM. H. HOLT FOR JOSEPH M. BEDINGER'S HEIRS, ETC.

1. Considering the will of Geo. M. Bedinger as a whole, it is plain that the limitation expressed therein as to the property devised to Elizabeth M. Bedford was intended by the testator to apply to all property therein devised to her, not only the specific devises but those *in residuum*.
2. The provision in the second codicil that "it is my will and desire that in the case of the death of my daughter, Elizabeth, before her son shall have arrived at the years of maturity, and should her son die without issue, that the property bequeathed shall revert and be merged in the estate," does not mean that if the daughter, Elizabeth, should die before her son arrived at the years of maturity that the son would then have a fee-simple title, and that he might, upon his death without issue will it to strangers in blood, as it was manifestly the intention of the testator to have his property remain in the family, and to revert to his other children and grandchildren in the event of the death of Robert without issue.

E. L. WORTHINGTON AND GARRETT S. WALL FOR APPELLEES.

1. Under the residuary clause of Bedinger's will Elizabeth Bedford took a fee-simple estate, (1) because she *did not die without issue*, so that the devise over on the contingency of her dying without issue never took effect, and (2) the devise over was invalid from the beginning because after giving absolute power of disposition, any limitation thereof by executory devise or otherwise, is void because it is repugnant to the estate first granted. (Ball v. Hancock, 82 Ky., 112; Howard v. Carusi, 109 U. S., 725; Jones v. Bacon, 28 Am. Rep., 1; Combs v. Combs, 1 Am. St. Rep., 359; 4 Kent's Com., 271.)
2. Where a life-estate is given to one with remainder over to another, with a provision that if the remainderman died without issue, then over, the devise over will not take effect unless the remainderman died without issue during the continuance of the particular estate. (Jones v. Moore, 28 S. W. Rep., 659; Ferguson v. Thomasson, 87 Ky., 519; Thackston v. Watson, 84 Ky., 206; Birney v. Richardson, 5 Dana, 424; Scott v. Best, 15 Ky. Law Rep., 795; Pruitt v. Holland, 92 Ky., 641; Webster v. Webster, 93 Ky., 632; Wills v. Wills, 85 Ky., 501.)
3. In the construction of wills, courts will sometimes change "and" into "or" or *vice versa;* but in no case should a court strike out a

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word used by the testator and insert a different word of its own, unless the intent of the testator as disclosed by other words used by him imperatively requires such a change. (2 Pomeroy's Eq., sec. 871; Gilmore's Estate, 35 Am. St. Rep., 855; Redfield on Wills, vol. 1, p. 471; Jarman on Wills, vol. 1, p. 469; Roff v. Belt, 12 B. M., 647.)

4 .In most cases where "and" is construed disjunctively, it is in order to favor the vesting of a legacy, not in order to defeat a previously vested gift; and generally where it will have the latter effect, it will not be so construed. (1 Jarman on Wills, p. 490.)

5. Indefiniteness in a public gift for charitable purposes as to the class of beneficiaries, does not make the gift void; such indefiniteness exists in all charitable trusts, and is principally what distinguishes them from private trusts. (2 Pomeroy's Eq., sec. 1025; Russell v. Allen, 107 U. S., 182; 2 Perry on Trusts, sec. 687; Leeds v. Shaw, 82 Ky., 80; Peynado v. Peynado, 82 Ky., 5; Kinney v. Kinney, 86 Ky., 610; Attorney-General v. Wallace, 7 B. M., 611; Moore v. Moore, 4 Dana, 354; Curling v. Curling, 8 Dana, 38; Cromie v. Louisville Orphans' Home Society, 3 Bush, 365; Penick v. Thorn, 90 Ky., 665; Gass v. Wilhite, 2 Dana, 177; Vidal v. Girard, 2 Howard, 127.)

6. A devise to a State for any object which it may properly aid or provide for is valid and the State may take as trustee of such a charity. (1 Dillon on Municipal Corporations, sec. 31; Dickson v. U. S., 125 Mass., 311; McDonough's Ex'ors v. Murdock, 15 How., 367; 1 Perry on Trusts, sec. 41; 1 Lewin on Trusts, 30.)

7. If the trust itself is valid in law, neither the heirs nor any other private persons have the right to inquire into or contest the right of the State to take the property and execute the trust. (Vidal v. Girard, 2 How., 127; McDonough's Ex'ors v. Murdock, 15 How., 367.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

Mrs. Elizabeth M. Bedford died in Lewis county in the month of February, 1860, leaving a son, Robert Bedford, who was then thirty-two years old. She made a will a short time before she died, which was duly probated, and which contains the following devises:

"1st. I give and bequeath to my son, Robert Bedford, all of my lands in Lewis county, to have and to hold during his natural life. . . . If said Robert Bedford should die

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leaving a child or children of his own body, then those lands are to go to those children and their heirs forever.

"2d. I give and bequeath to my son, Robert Bedford, all the lands and other property I own in the county of Nicholas, to have and to hold during his natural life. . . .

"4th. In case my son Robert dies leaving children of his own natural body, I give and bequeath all my lands to them and their heirs forever. But if my son dies without a child or children, then I desire that all my lands in Lewis and Nicholas be sold, and the money arising from said sales I give and bequeath to the State of Kentucky forever in trust, that the said State will forever hold the same for the use and benefit of the children of the State; that the said State will invest said money in some profitable bank stock, and the profits therefrom I desire to be appropriated annually forever towards the education of the children of the State of Kentucky, particularly the poor and most unintelligent. I desire that this money constitute a permanent school fund, and the interest from this fund be appropriated annually towards the education of the children of this State."

The testatrix owned at the time of her death a tract of 343 acres of land in Lewis county, which she purchased in the year 1836. She owned or claimed to own also a tract of 200 acres, and one of 300 acres, both in Nicholas county, and an undivided interest of one-fifth in a tract of about 460 acres, situated in Nicholas and Robertson counties, under the will of her father, George M. Bedinger, deceased, who died domiciled in Nicholas county, and whose will was probated and recorded in that county. The question whether she owned and had the right to dispose of the lands claimed under her father's will must be determined by the meaning of several clauses of his will, which will be referred to.

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Robert Bedford survived his mother twenty-seven years, and died in 1887, in Mason county, leaving a widow, appellant, Susan M. Bedford, having made a will by which he devised to his widow all of his property. He died without ever having had issue.

The death of George M. Bedinger occurred in the year 1843. He left a widow, Henrietta; four sons, Henry C., Daniel P., Benjamin F. and Joseph Bedinger; and one daughter, the said Elizabeth M. Bedford. By his will, after making numerous specific devises, including a liberal provision for the comfort of his widow, he left the residue of his property to his said sons and daughter. The body of his will was written in 1838, to which were added two codicils, the first bearing date 11th day of July, 1842, and the second the 28th day of May, 1843.

In the body of his will he devised to his daughter a tract of 200 acres of land, using the following language: "To my daughter, Elizabeth M. Bedford, I give and bequeath 200 acres of land lying on the east side of the Maysville turnpike road. . . . The property bequeathed to my daughter, Elizabeth M. Bedford, to go to her child or children at her death or, *if she and her son Robert die without children*, the estate to revert to her four brothers now living, their heirs or assigns forever."

The residuary clause of his will is as follows: "The residue of my estate, of every description, with all reversions, I will and bequeath to my five living children equally and should any of them *die without issue before they have disposed of their interest in any realty thus devised*, their portion to the others living or having issue, their heirs or assigns forever."

In the first codicil of his will he made the following provision: "My further will and desire is that my beloved wife,

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Henrietta, should have the use and benefit of all my land not specifically willed to my children, and I hereby will and bequeath the same to her during her natural life, in addition to the bequests heretofore devsed to her, and at her death my will and desire is that that part given to my wife during her life should be divided into five equal parts, four parts to go to my sons, Henry C., Daniel P., Benjamin F. and Joseph Bedinger, and their heirs forever, and the other fifth bequeath to my daughter, Elizabeth Bedford, and should my children or grandchildren, to whom I have willed anything, die without issue, that then the property thus willed should revert back to my surviving children and their heirs in equal proportion."

Finally, in the second codicil to his will, which was written a short time before he died, he used the following language; "First, . . . instead of the various devises contained in the preceding will, I will to my wife one equal third part of all my property, both real, personal and mixed, during her natural life, and *after my death* my will and desire is that the same be equally divided between my five children now living, to-wit, Henry C., Daniel P., Benjamin F. and Joseph Bedinger and Elizabeth M. Bedford, their heirs and assigns forever; . . . sixth, it is my will and desire that in case of the death of my daughter, Elizabeth, *before her son shall have arrived at the years of maturity, and, should her son die without issue*, that the property bequeathed shall revert and be merged in the estate."

This suit was brought by Thos. S. Clark, administrator *de bonis non*, with the will annexed, of Elizabeth M. Bedford, deceased, to sell said lands and have the proceeds paid to the State of Kentucky in accordance with the terms of her will. There is no controversy about Mrs. Bedford's owner-

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ship and her right to dispose of the tract of land in Lewis county, which was purchased by her in 1836. But the appellant, Susan M. Bedford claims all of the lands mentioned, both in Lewis and Nicholas counties under the will of her husband, the said Robert Bedford, alleging that the disposition of these lands in the will of his mother, Elizabeth M. Bedford, was so vague, indefinite and uncertain, especially in regard to the beneficiaries of the trust attempted to be created, as to render it absolutely void. Her contention is that by virtue of the provisions of the second codicil to the will of George M. Bedinger, deceased, Elizabeth M. Bedford having died after her son Robert reached his majority, the title to the lands in Nicholas county devised to her became absolute, and that, being thus seized in fee of all the lands claimed by her, at her death they descended to Robert, and passed to her under his will, the devise to the State of Kentucky, in trust being absolutely void, as above stated.

On the other hand it is claimed for the other appellants, the heirs of the four brothers of Mrs. Elizabeth M. Bedford, all of whom are dead, that under the will of George M. Bedinger, deceased, Mrs. Bedford had only a life interest in the Nicholas county lands devised to her, and that the said Robert Bedford having died without issue the said lands reverted at his death and vested in the four sons of the said George M. Bedinger, who are named in his will, or their heirs, while the appellee, Garrett S. Wall, who had, prior to the commencement of the action, been appointed by the superintendent of public instruction, in pursuance of the provisions of the General Statutes (section 4397 of the Kentucky Statutes), agent for the State to collect and take charge of the money, claims that under the will of Elizabeth M. Bedford, the State is entitled to receive as trustee the

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proceeds of the sale of all of the lands intended to be disposed of by her, on the ground, as alleged, that she owned the same absolutely at the time of her death and had the right to dispose of them, and that the said Robert Bedford, to whom she devised a life estate in them, died "without a child or children."

On the final hearing of the cause, the court below in substance adjudged that Mrs. Bedford owned all of the lands above mentioned in fee simple, and that they passed under and in pursuance of her last will, except the 200-acre tract in Nicholas county, in which it was adjudged she had only a life estate, and which, therefore, did not pass under her will.

The court accordingly adjudged that the 200-acre tract belonged in proper proportions to the heirs of the four brothers of Mrs. Bedford: Joseph Bedinger, one of the four brothers, being a defendant, but having died after the judgment was rendered, his heirs were by proper proceedings made parties to the appeal in this court, and the judgment which we have recited is before us for review.

Although proper exceptions were taken in behalf of the State or its agent with regard to so much of the said judgment as established the claim of Joseph Bedinger and others to the 200-acre tract of land, the State or its agent is no longer concerned in that question as the case now stands, because no appeal was prayed or is now prosecuted from the judgment in behalf of the agent of the State. But the question as to the correctness of that part of the judgment is before us on the appeal of Susan M. Bedford, and its solution depends upon the meaning that is to be given to the clause of the will of George M. Bedinger, by which this tract of land was devised to Elizabeth M. Bedford, which we have quoted. This question we will notice first.

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In a preceding part of his will the testator had devised certain portions of his lands to each of his four sons. To three of them he had devised their respective portions, "to them and their heirs and assigns forever." The portion of his other son, Joseph, he devised to trustees, for the use and benefit of himself and his children, but upon such a scheme as was intended that he or his children should eventually have the actual control and final disposition of the land or its proceeds. But to his daughter, Mrs. Bedford, he devised the 200 acres limiting her interest in the land to a life estate, by providing that it should go "to her child or children *at her death*," and this limitation to her was followed by the further provision that "if she *and* her son, Robert, *die without children*," the estate to revert to her four brothers now living, "their heirs or assigns forever."

It is contended that since both Mrs. Bedford and her son Robert died without child or children surviving them, the title to the land vested at the death of the said Robert in the said Joseph Bedinger and the heirs of Mrs. Bedford's other three brothers, all of whom were then dead. But this contention can not be sustained. In construing testamentary provisions of this kind it is sometimes quite difficult to determine to what period the words "dying without children," or words of similar import, refer. And often precedents are of little avail to aid in reaching a correct interpretation of such provisions on account of the great variety of forms of expression in wills, and of the different meanings that are attached to technical words and sentences by different testators.

On this subject, Mr. Justice Miller, in Clarke v. Boorman, 18 Wall., 493, said: "No two wills, probably, were ever written in precisely the same language throughout, nor do

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any two testators die under the same circumstances in relation to their estate, family and friends. And it would be very unsafe as well as unjust to expound the will of one man by the construction which a court of justice had given to that of another merely because similar words were used in particular parts of it."

These considerations illustrate the necessity of limiting the ordinary rules of testamentary construction in their application and of subordinating them to the cardinal rule, which is of universal application, that the intention of the testator, as gathered from his entire will, must prevail if not opposed to some positive provision of the law or to some general principle of public policy. (Schouler on Wills, sections 462, 464, 466, 468.)

Applying this cardinal rule of construction and gathering from the other provisions of the will of George M. Bedinger, with regard to these specific devises of land to his children that it was his intention that the living beneficiaries should be eventually the absolute owners of the portions devised to them respectively, it is our opinion that he intended that the portion devised to his daughter and her son should revert to his other children only in the event *both of them* died without children previous to his death.

Upon this construction, which we think is a rational one, and in exact accord with the intention of the testator thus ascertained, both Mrs. Bedford and her son Robert having survived the testator, the former was left with a life estate in the land, with remainder in fee to the latter, which was subject only to the possibility of being divided upon the death of Mrs. Bedford, leaving other children surviving her. It follows that at the death of Mrs. Bedford the said Robert, being her only child, became vested with the absolute title

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to the 200 acres of land in controversy under the will of George M. Bedinger, deceased, and that it passed at his death and under his will to the appellant, Susan M. Bedford, unless the character of his interest in the land was changed by subsequent provisions of the will and codicils, and that question we will now consider.

In the body of his will, George M. Bedinger left to his wife, Henrietta, a farm of 300 acres, called his "mill farm," for life, besides a small farm of about 80 acres, also for life, it being the farm on which he lived, some negro slaves and all of his household and kitchen furniture and provisions.

It will be observed, by reference to the residuary clause of his will, which we have quoted, that taking out what he had left to his wife and the specific devises and bequests he had made to his five children, and some of his grandchildren named in the will, he left all the residue of his estate of every description to his "five living children." This clause contains the provision that should any of his five children "die without issue *before they have disposed of their interest* in any realty thus devised their portion (shall pass) to the others living or having issue."

It is ably contended by counsel for the appellees, and there is strong authority to support the contention that the language quoted vested his children with the unlimited right to dispose of the property left them respectively, and that, therefore, each of them was thereby vested with a fee simple title to the property received under this clause. We are inclined to the opinion that this is the legal effect of the language used when taken in connection with the words, "their heirs or assigns forever," which occur at the end of the clause quoted from. But it is not necessary for our purpose now to decide that point. We have quoted this

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language to show that the restriction, if there be any in the residuary clause of the will, does not operate upon the property embraced in the specific devises to the children of the testator, but only upon the property that passed to them under the residuary clause. The language is with reference to the disposal by his children of the "realty *thus devised*"—that is, devised to them by the residuary clause. The language quoted is susceptible of no other reasonable interpretation.

Coming now to the first codicil, which was executed on the 11th day of July, 1842, by that addition to his will he provided that his wife should have for life all of his land *that had not been specifically devised to his children*, in addition to what had been left to her in the body of his will, and provided further that at her death all of the property left to his wife during her life should be divided into five equal parts—"four parts to go to my sons, Henry C., Daniel P., Benjamin F. and Joseph Bedinger, *and their heirs forever*, and the other fifth bequeath to my daughter, Elizabeth Bedford."

It is contended by counsel for appellants that the provision last quoted did not vest Mrs. Bedford with a fee in the property to which she was entitled under the first codicil, but we are of the opinion that it was intended by the testator that all of his children named in the codicil should have the absolute title to the property they were respectively entitled to thereunder, and that the use of the words "and their heirs forever," after the gift to his sons, and the failure to use the same words after the gift to his daughter, did not evince an intention on his part that the daughter should be vested with a less interest in her share than his sons would have in their respective shares; but much stress

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is laid upon the latter part of this clause of the codicil, which provides that "should my children or grandchildren, to whom I have willed anything, die without issue, that then the property thus willed should revert back to my surviving children and their heirs in equal proportion," and it is contended that the legal effect of this part of the clause was to change the fee of the property devised to each of his children and to his grandchildren into a defeasible fee.

But while it is unnecessary to decide that question here, owing to the peculiar wording of the whole clause, it would not, in our opinion, be an unreasonable construction of the part of it last quoted to refer the words "die without issue" to the death of any of the testator's children or grandchildren before the death of the testator, as we have done in construing the clause by which the tract of 200 acres of land was devised to Mrs. Bedford; but whether this would be a fair construction or not it is quite evident that the first codicil was not intended to operate upon the specific devises made to the children of the testator in the body of his will because the land devised to them was expressly excepted from the devise therein made to his wife of all his land "not specifically willed to my children."

If, however, the clause now under consideration ought to receive the construction contended for by counsel for the appellants, so far as thus construed, it would affect the title to the property devised to Mrs. Bedford, its operation is defeated by the second codicil, which will be next considered.

The second codicil bears date 28th day of May, 1843, not long before the death of George M. Bedinger. He was led to add this codicil to his will by the fact that he had leased for a term of years his residence and adjoining property, a part of which had been devised to his wife, which made it

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necessary, in his opinion, "to change and explain many items contained in the will and codicil, to which this is attached." Consequently, in the first item, "instead of the various devises contained in the preceding will," he left to his wife "one equal third part *of all my property*, both real, personal and mixed, during her natural life," and provided that "*after my death* my will and desire is that the same *be equally divided between my five children*," naming them, "*their heirs and assigns forever.*"

In other items of this codicil he referred to some of the specific devises that he had made, from which we conclude that he did not intend that any of them should be changed in any way by the first item of this codicil above quoted; and it is a familiar principle that where the terms of a will clearly give an estate, the words of a codicil must manifest an equally clear intent to revoke or change it before they will be allowed to have such an effect. (Sturgis v. Work, 122 Ind., 134, 17 Am. St. Rep., 349.)

Finally, in the sixth item of this codicil, he provided that in case of the death of Mrs. Bedford, "*before her son shall have arrived at the years of maturity, and should her son die without issue*," then the property "bequeathed" to her should "revert and be merged in the estate." This is clearly *a double contingency*, upon the happening of which the reversion of the property devised to Mrs. Bedford under this codicil was made to depend, and the general rule is that when an estate depends upon a double contingency both must concur. (Phelps v. Bates, 54 Conn., 11; 1 Am. St. Rep., 92.)

We have seen that in this codicil the property was devised to Mrs. Bedford and her four brothers in fee simple, but the portion devised to Mrs. Bedford was made subject to rever-

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sion upon two conditions or contingencies: First, her death *during the minority* of her son; and, second, his death without issue *during his minority.*

We think the second contingency, as we have stated it, is the proper construction, but we do not regard it as material because the effect of the failure of either event upon which the reversion depended to happen was to prevent the reversion— that is, the death of Mrs. Bedford during the minority of her son, *and his* death without issue either during his minority or after he attained his majority—so that when the son reached his majority, his mother surviving, every condition or contingency was removed from her title to the property, and she at once became the absolute owner of it with full power to dispose of it in any way she might choose to do.

It follows that Mrs. Elizabeth M. Bedford had the right to dispose of all her land by will except the tract of 200 acres, in which, as we have seen, she had only a life estate, and that the devise of it, after the death of her son, to the State of Kentucky in trust is valid unless it is so indefinite and uncertain as to the object and the beneficiaries of the trust as to render it impossible to execute the trust. And this we are now to determine.

The clause of Mrs. Bedford's will by which the lands that she owned in Lewis and Nicholas counties, and which she had the right to dispose of, were devised to the State of Kentucky in trust, has been quoted. After the termination of her son Robert Bedford's life estate in these lands which was devised to him, and upon his death, without child or children, she required the lands to be sold, and bequeathed the proceeds of the sales to the State of Kentucky "forever in trust," and to be held by the State forever "for the use

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and benefit of the children of the State," the money to be "invested in some profitable bank stock, and the profits therefrom . . . to be appropriated annually forever toward the education of the children of the State of Kentucky, particularly the poor and most unintelligent." She desired that the money should constitute "a permanent school fund, and the interest from this fund be appropriated annually towards the education of the children of this State."

It is contended that this disposition of her property was invalid because of indefiniteness, and that the property descended to her son, Robert Bedford, and passed to his wife, appellant, Susan M. Bedford, under his will. The allegation is that the foregoing devise "is so uncertain, indefinite and ambiguous as to its purpose and beneficiary objects as to render it insusceptible of execution or enforcement, and is, therefore, ineffective and inoperative, and should be held for naught."

Counsel for appellants have wholly failed to sustain their contention as to the indefiniteness and the consequent invalidity of this bequest of the proceeds of the sales of the lands of Mrs. Bedford. It is definite, as has been fully sustained in the arguments of counsel for the agent of the State, first, as to the *trustee*; second, as to the *beneficiaries*; and, third, as to the *object* and *purpose* of the trust.

It is not contended that the State may not be a trustee of a charity, nor that *education* is not a proper purpose for which charitable uses may be created; but it is contended that the beneficiaries are so indefinitely described that they can not be identified. Indefiniteness in the latter particular characterizes all charitable trusts to a greater or less degree, and it is said to be the one thing that distinguishes such a trust from a mere private trust. (2 Pomeroy's

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Equity, section 1025; Russell v. Allen, 107 U. S. Rep., 182.)

In the latter case the court said that charitable trusts "may, and indeed must be, for the benefit of an indefinite number of persons, for if all the beneficiaries are personally designated the trust lacks the essential element of indefiniteness which is one characteristic of a legal charity."

In numerous cases trusts of this kind have been sustained by this court which it is not necessary to review. (Moore's heirs v. Moore's devisees, &c., 4 Dana, 354; Curling v. Curling, 8 Dana, 38; Attorney General v. Wallace, 7 B. Mon., 611, Cromie's heirs v. Louisville Orphans' Home Society, 3 Bush, 365; Peynado v. Peynado, 82 Ky., 5; Leads v. Shaw's adm'r, *Ib.*, 79.)

In the Peynado case the beneficiaries of the trust were to be "as many little orphan children (males) from respectable families as can possibly be taken" into an orphan asylum and school that was provided for, and the trust was held to be valid.

In the case of Leeds v. Shaw a bequest was made of the income of certain stocks, which was directed "to be paid over every year to the trustees of the Lagrange School District, and by them expended in the education of poor children, or towards the maintenance of a good common school in said district, etc.," and this was held not to be void for uncertainty. And so we hold that the bequest in this case is sufficiently definite in every particular, and that it is valid.

For the reasons given so much of the judgment of the court below as adjudged that the tract of two hundred acres of land in Nicholas county that was devised to Elizabeth M. Bedford specifically by the will of George M. Bedinger, deceased, belonged to Joseph M. Bedinger and others is reversed and the cause remanded, with directions to enter a

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judgment in favor of the appellant, Susan M. Bedford, for the said tract of land, and so much of the said judgment as adjudged that the testatrix, Elizabeth M. Bedford, had a fee simple interest in the tract of 300 acres, and the one-fifth of the tract known as the Blue Lick property, containing about 460 acres, in Nicholas county, and in the tract of 343 acres in Lewis county, and that the same passed under her will, and that the said lands be sold and the proceeds thereof paid to Garrett S. Wall, the agent of the State of Kentucky, be affirmed, and such further proceedings may be had in the cause in the court below as may be necessary to execute the said judgment of sale and to secure the rights of the parties in interest.

CASE 50—PETITION ORDINARY—MAY 22.

City of Hawesville v. Board of Education of Hawesville.

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103 329

APPEAL FROM HANCOCK CIRCUIT COURT.

1. REPEAL OF A LOCAL ACT BY A GENERAL ACT.—The provisions of a local act incorporating a town and the amendments thereto, which were passed under the former Constitution of Kentucky, which did not prohibit local legislation, giving to a school board a certain per cent. of revenue derived from taxation of the liquor traffic, stand repealed by the charter for cities of the class to which that town belongs, wherein it is provided that all money so derived shall go into the general fund.

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R. Y. BUSH AND T. M. WHITE FOR APPELLANT.

1. The provisions in the charter for cities of the fifth class, to which class Hawesville belongs, which charter was passed pursuant to the mandate of the new Constitution, authorizing such cities to collect license fees for the sale of spirituous, vinous, and malt liquors, and providing that same shall be paid into the general fund of the city, certainly operated as a repeal of the provisions of the old charter by which 80 per cent. of such license fees went to the school fund.
2. It was obviously the intention of the framers of the new Constitution to provide for the incorporation and organization of all cities and towns in the State by general law, classifying them, and that the legislature should pass general laws for their government; and they must have intended that upon the passage of such general laws, the former laws governing them should stand repealed. (Holtzhauer v. City of Newport, 15 Rep., 188; Byrne v. City of Covington, 15 Rep., 33.)

D. L. ADAIR FOR APPELLEES.

1. There is nothing in the new Constitution nor in the charter for cities of the fifth class, which even by implication, repeals the school law in the old charter of Hawesville. On the contrary, it is expressly provided in the charter for cities of the fifth class that all moneys received shall be for the benefit of the fund to which they respectively belong.
2. The appellee has acquired vested rights under the charter which can not be taken from it without impairing the obligation of contracts. Even in the charter of a city or public corporation vested rights may be created and corporate rights acquired which the legislature can not afterwards divest or control. (Const. of the United States, sec. 10; Const. of Ky., sec. 19; City of Louisville v. University of Louisville, 15 B. M., 642; Dartmouth College v. Woodward, 4 Wheat., 518; Cooley's Const., Lim., 334; Mills v. Williams, 11 Ired., 558; Kent's Com., vol. 2, 305 and notes; Kent's Com., vol. 1, 414 and 419.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by the city of Hawesville from a judgment rendered in the action of the board of education of Hawesville against the appellant.

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It appears that in 187— and 1882 and 1888 sundry acts of the Legislature were passed regarding the city of Hawesville, as well as organizing or incorporating the board of education, and at one time it seems that the law set apart all license fees paid by vendors of ardent spirits in Hawesville for the benefit of the board of education. In 1882 an act was passed extending the limits of the said town, etc., and in 1888 an act was passed giving the trustees power to license coffee houses, etc., for the sale of ardent spirits, etc., and provided that eighty per cent. of such license should be paid to and be for the benefit of the board of education, and the residue be applied to the payment of marshals' salary and police expenses. All parties proceeded to act under and according to the provisions of the act of 1888, until some months after July 3, 1893, at which time appellant refused to pay to appellee any part of the license fees received after the act of 1893. Therefore, appellee instituted suit to recover the same.

The case was submitted upon an agreed statement of facts, and the court rendered judgment in favor of appellee for $638, and from that judgment this appeal is prosecuted, that sum being eighty per cent. of the license fees collected. Appellee obtained a cross-appeal, and insists that the entire license fees should be paid to it, assuming and contending that the act of 1888 setting apart the twenty per cent. for city purposes, being a change of the former law, was and is void.

The contention of appellee is that by the charter of appellee and acts of the Legislature it acquired a vested right to all such license fees, and relies on the Dartmouth College and many other decisions to support its contention. It also contends that the act of 1893 for the government of towns

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of the fifth class, to which class appellant belongs, is not inconsistent with the local laws quoted and relied on by it.

It seems clear to us that the act of July 3, 1893, repealed all laws inconsistent with it, and the several local acts relied on by appellees, being inconsistent with the general law of 1893, were repealed thereby. Subsection 4 of section 3637, Kentucky Statutes, authorizes the city council to license vendors of spirituous liquor, and requires not less than $250 nor more than $1,000 license fee to be paid.

Section 3646 *supra* provides that all moneys received from licenses shall be paid into the general fund.

It seems clear to us that, under the law in force from and after July 3, 1893, all license fees imposed and collected under the authority of the city council properly belong to the general fund of the city of Hawesville, and the license collected and required to be paid to the State authorities should be paid to the proper officer authorized to receive the same.

For the reasons indicated the judgment on the cross appeal is affirmed, and the judgment on the original appeal is reversed and cause remanded, with directions to render judgment in favor of appellant on its counterclaim and for proceedings consistent with this opinion.

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CASE 51--PETITION ORDINARY. TRANSFERRED TO EQUITY. APRIL 4.

99 296
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Schwearman v. Commonwealth.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. SALOON LICENSE—WHEN COUNTY CLERKS MAY COLLECT WITHOUT ORDER OF COUNTY COURT GRANTING.—The provision in Section 4203 of the Kentucky Statutes that the County Court shall have exclusive jurisdiction to grant saloon licenses applies only to the county, and not to incorporated cities and towns, in which express authority to grant or withhold such licenses is granted to the municipal authorities. It is therefore not necessary in a suit on a county clerk's bond to recover for license fees not accounted for, the fees having been collected for licenses granted by municipal authority, to allege that there had been an order of the county court granting the licenses.
2. COUNTY CLERKS—OFFICIAL BOND—SURETIES—LIMITATION.—A surety on a county clerk's bond is released after seven years, under the provisions of section 2551 Kentucky Statutes, and section 2515 providing that actions for relief on the ground of fraud or mistake shall be commenced within five years next after the cause of action accrued, and the provision of section 2519 that such cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, have no application to actions on official bonds of public officers.

T. M. HILL FOR APPELLANT.

1. The county court alone had the power to grant the license under the provisions of the statute, and the license not having been granted by the county court, there was no tax due the State. (Commonwealth v. Wilson, 7 Rep., 666.)
2. The seven year statute of limitation in favor of sureties applies to this case. (Commonwealth v. Gardner, 17 Rep., 75.)
3. This is not an action for relief from fraud or mistake, and the sections of the statute relative to such actions have no application.

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IRA JULIAN AND WM. J. HENDRICK FOR APPELLEE.

1. The presumption is that the licenses issued by the clerk were authorized by the county court; otherwise the clerk could without authority issue licenses and collect the fees therefor, and when sued for the money take advantage of his own wrong by claiming the county court did not authorize the issual of the license.
2. Where the law imposes a public duty, it is unnecessary in pleading to allege it; or where, upon a state of facts presented, a duty necessarily arises by implication, it need not be stated. (9 Bush, 528.)
3. This is an action for the recovery of money withheld by and through the fraud of the county clerk; and it is not necessary that an action should be, technically, an action for relief from fraud or mistake before the equitable principle embodied in the statute should be applied. (Wood on Limitation, pp. 115, 382, 590, 588; American & English Enc. of Law, Vol. 13, pp. 727-28; Bailey v. Glover, 21 Wallace, 342.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

August 29, 1882, Thomas Jones, clerk of the Campbell County Court, and his sureties, Frank Schwearman and others, executed a bond to the Commonwealth of Kentucky, covenanting he would faithfully discharge all the duties of said office and pay over in due time to the proper persons any money received by him as clerk.

July 29, 1893, the Commonwealth instituted this action against Jones and his sureties, Katherine Schwearman, widow and sole devisee of Frank Schwearman, then deceased, being also made a defendant. In the petition it is alleged that during the period from September, 1883, to September, 1885, Jones as clerk had collected a stated amount of saloon license fees, which he failed to pay over or report to the auditor, or in any way account for, as by law it was his duty to do, and judgment therefor was asked.

The action, having by agreement of parties been transfer-

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red to equity, was referred to the master commissioner, who, after taking proof, made a report of the amount of such fees received during the period mentioned by Jones as clerk which he had not accounted for to the Commonwealth. Thereupon the court, confirming that report, rendered judgment in favor of plaintiff for the sum of $1,950 against the defendants, including Katherine Schwearman, though it is to be enforced as to her only to the extent of assets received from the estate of her deceased husband. There was a further judgment for $800 against all the defendants except her, it appearing an order of the county court was made in June, 1885, releasing her husband from future liability on the bond.

As none of the other defendants have appealed, the inquiry is whether the judgment for the first named sum, so far as it affects Katherine Schwearman, is erroneous.

The first of the grounds relied on in argument for reversal is that a cause of action is not stated in the petition, which, as contended, ought to have contained an averment that the saloon licenses in question were granted by order of the Campbell County Court. The statute did, during the period referred to, and does now, by section 4203, Kentucky Statutes, provide in general terms that all licenses to sell by retail spirituous, vinous or malt liquors shall be granted by the county court, and in cases to which that provision applies the clerk thereof can not, without an order of court, legaly either issue a license or collect tax therefor.

It was accordingly held in Commonwealth v. Wilson, 7 Ky. Law Rep., 666, cited by counsel, that an indictment against a county clerk for misappropriating money received by him as tax upon a license to a merchant to retail liquor was defective in omitting a statement that the license was granted

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by the county court. But exclusive authority to grant licenses to sell by retail liquor in an incorporated city or town is generally vested in the municipal government, and the exercise of such license then is not at all dependent upon an order of the county court. On the contrary, express provision is made by statute in such cases for collection by the clerk, independent of the county court, from the person licensed, the State tax prescribed in addition to the tax imposed for the benefit and collected by an officer of the city or town.

The particular condition in which it is provided the county court shall have exclusive jurisdiction to grant licenses to sell by retail liquor plainly apply to the country; or, in the language of the statute, "a neighborhood," and not to an incorporated city or town, when authority to grant or withhold coffee-house, or what is commonly understood, "saloon license," is conferred upon the municipal officer or officers thereof. It was not, therefore, necessary for plaintiff in this case to allege, nor could it have been truthfully alleged, that there had been an order of the Campbell County Court granting the licenses, taxes on which it is stated were collected and appropriated by Jones for his own use.

The plaintiff does not allege in terms the licenses in question were even granted by authority of the city of Newport, or any other city or town in Campbell county. But it seems to us that inasmuch as the statute conferred the right and imposed the duty upon the county court clerk to collect for the benefit of the Commonwealth the prescribed amount of tax on each coffee-house or saloon license granted by municipal authority, it may be fairly implied from the language of the petition licenses were granted in each case mentioned.

The next question is whether the statute of limitation can

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avail the sureties in the bond, it being shown that more than seven years had elapsed after the collection and appropriation by Jones of the license taxes in question, or rather after June, 1885, when Frank Schwearman was released from liability, before the action was commenced. And that question involves the construction of the statute not heretofore made by this court.

Section 2551, Kentucky Statutes, is as follows: "A surety in any obligation or contract . . shall be discharged from all liability thereon when seven years shall have elapsed without suit thereon after cause of action accrued."

And it is qualified by section 2552, which provides that limitation of actions against sureties shall not apply to so much of the time elapsed when there was no executor, administrator or other person authorized to commence an action, nor to the six months during which an action can not be brought against a personal representative, nor to any delay assented to by the surety in writing, nor when the surety obstructs or hinders his being sued.

Section 2515 provides that an action for relief on the ground of fraud or mistake shall be commenced within five years next after the cause of action accrued. But it is qualified by section 2519 as follows: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, but no such action shall be brought ten years after the making of the contract or perpetration of the fraud."

If the last quoted section applies in this case appellant is not released, because it fully appears that the fraud of Jones was not nor could, by reasonable diligence, have been discovered within ten years after the time of the perpetra-

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tion of the fraud, if it was in the meaning of that section a fraud.

But we think the last two sections were not so intended nor can appropriately apply to an action on the official bond of a clerk or other public officer, for under section 2514 an action may be brought against a public officer for a breach of his official bond at any time within fifteen years after the cause of action first accrued, whether that cause consists of the fraudulent appropriation of public money to his own use, or defalcation or other breach resulting from mere misfortune or miscalculation. But if section 2519 be made to apply it would strangely result that the Commonwealth, while still retaining the right under section 2514 to bring an action against a public officer at any time within fifteen years after the breach of his bond, if it was not a fraudulent breach, an action for a breach, if fraudulent, could not, under the operation of section 2519, be brought against him ten years after the perpetration of the fraud. Another absurd and improper result would be that while the period within which the Commonwealth could maintain an action against a public officer for the fraudulent breach of his bond would be lessened by the operation of section 2519 to ten years, the period within which an action might be maintained for the same cause against his sureties, wholly innocent of the fraud, would be prolonged from seven to ten years. Certainly the legislature never intended these sections should be so construed and applied.

In our opinion the only conditions or acts which do stop running of the statute of limitation in favor of sureties are prescribed in section 2552.

The judgment is reversed for dismissal of the action against appellant.

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CASE 52—PETITION ORDINARY—APRIL 25.

99 202
e117 194

Massachusetts Benefit Association v. Richart.

Same v. Patrick.

APPEALS FROM CAMPBELL CIRCUIT COURT.

1. DEFECTIVE PLEADING—INTENDMENT AFTER VERDICT.—When a defective pleading states facts sufficiently general to comprehend a fair and reasonable intendment, and there is enough in it to show that the plaintiff had a cause of action, the defect in the pleading will be cured by a verdict.

WRIGHT & ANDERSON FOR APPELLANT.

1. It was a condition precedent to the validity of the policy of insurance that the payment of the first premium should be made, and that there should be an actual delivery of the policy to the insured during his life-time and while he was in good health.
2. The allegation in the petition "that said Charles C. Patrick paid all dues and mortuary premiums provided for in said policy and in accordance with said semi-annual rate in full up to his death," is not a sufficient plea of the payment of the premiums, but is merely a conclusion of law.
3. In a suit on a life insurance policy the pleading as to the proof of death must be in the particular manner required by the terms of the policy; otherwise the pleading will be considered defective.
4. A pleading should be construed most strongly against the pleader, and where there is a traverse in a pleading, followed by a confession and avoidance, the traverse becomes valueless and the confession and avoidance remains the only plea to be considered; and if that plea is so defective as to leave the new matter in the answer undenied, the defendant is entitled to judgment on the pleadings.
5. In a suit on an insurance policy the plaintiff must allege facts showing the performance of all conditions precedent to his right to sue, and the omission of such averments is fatal, either on demurrer or in case of a judgment by default. An allegation in a general way that all the conditions of the policy had been fulfilled, is not a sufficient allegation of a performance of conditions precedent. (Royal Insurance Co. v. Smith & Beall, 8 Ky. Law Rep., 521.)

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L. J. CRAWFORD FOR ANNA C. PATRICK.

1. It is not necessary to allege payment of consideration in suing on a contract which acknowledges receipt of such payment and which is filed with the petition as part of it. (32 Am. State Reports, 362; May on Ins., Sec. 591; Wood on Ins., Vol. II, page 552; Bacon on Benefit Soc. and Life Ins., 455 and 460; Cook on Life Ins., Sec's 14-93 and 123; 11 Arnold on Ins., 1287; 92 Am. Dec. page 529; 85 Am. Dec., page 240 and note; 85 Am. Dec., page 610 (Ky case referred to); 1 Duval, 92; 92 U. S., 377; Pridmont v. Erving, 60 Federal, 236; 5 Am. R. R. & Co. reports 463 and note; Winifred on Adjudged Words and Phrases, page 310.)
2. Insurance companies are held responsible for the knowledge of their soliciting agents. (Kenton Ins. Co. v. Downs, 90th Ky., page 245. Wright's Adm'r v. Northwestern Mutual Life Ins. Co., 91st Ky., page 208.)

E. P. SIMMONS FOR ANNA B. RICHART AND JOHN RICHART.

1. When the fact of *satisfactory proof furnished* is alleged, such an allegation is an allegation of fact. (Newport Light Co. v. City of Newport, 14 Ky. Law Rep., 55; L. & N. R. R. Co. v. Fletcher, 11 Ky. Law Rep., 260; Pomeroy on Remedies, etc., section 549.)
2. Provisions of life insurance policies not inserted in the body of same are simply matters of defense and not conditions precedent. Cronkhite v. Travelers' Ins. Co. of Hartford, Conn., 17 Am. St. Rep., 184; Redman v. Aetna Ins. Co., 49 Wis., 431; Cooper v. Poston, 1 Duval, 92; Arnold on Ins., 1287; Pino v. Merchants' Mutual Ins. Co., 92 Am. Dec., 529; Firemans' Fund Ins. Co., etc., v. Meschendorf, etc., 14 Ky Law Rep., 757; Nichols v. Smitt, etc., 78 Ky., 630; Royal Ins. Co. v. Schwing, 10 Ky. Law Rep., 382.)

OTTO WOLFF FOR ANNA B. RICHART AND JOHN RICHART.

1. When the fact of *satisfactory proof furnished* is alleged, such an allegation is an allegation of fact.
2. Provisions of insurance policies not inserted in the body of same are simply matters of defense and not conditions precedent.

J. W. MENZIES FOR APPELLEES.

1. The word "acceptance" used in connection with "satisfactory proof" means "reception."

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

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There seems to have been a trial in this case with a verdict and judgment for the plaintiff, and no bill of evidence with the record, so the entire case turns upon the question of pleading. Did the pleading authorize the verdict; and, if the pleading is defective, was it not cured by the verdict? There was no demurrer, general or special.

The doctrine of intendment implies after verdict in this State as at common law, and if the averments of the petition are too general, by reason of statements that all precedent conditions have been complied with on the part of the plaintiff, and proof satisfactorily offered of the death of the insured, as well as other general averments, such defects will be cured by verdict. These two actions are on policies of insurance, with an answer in the one case and a verdict and judgment in the other without any defense.

It is averred that the lives of the persons deceased were insured for the benefit of the plaintiffs, and the policies executed and delivered by the company to the insured, with a general averment of performance on the part of those interested in the policy or all entitled to its benefits. The rule is, where the declaration states facts sufficiently general to comprehend a fair and reasonable intendment, the defective statement will be cured by the verdict. There is enough in either petition to show the plaintiff had a cause of action.

The answer filed in the one case places in issue only the false statements alleged to have been made by the deceased when making his application for insurance. This is denied by the reply, and it was pleaded by the plaintiff that appellant's agent knew all about the matters of which the company now complains, and was the agent not only of the company sued, but was the agent of the company to which ap-

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plication for insurance had been made and refused, and the answer that no other insurance had been applied for was made by the agent who was cognizant of all the facts. The case went to the jury on the testimony that is not before us, and what was proven or the instructions are not disclosed by the record. There is no merit in either appeal.

Judgment affirmed in each case.

CASE 53—CONTESTED ELECTION—APRIL 28.

Major v. Barker.

99 305
104 711

99 305
e107 451

99 305
j112 31
j112 49
j112 51
112 64

APPEAL FROM CHRISTIAN CIRCUIT COURT.

1. ELECTIONS—DISABILITY OF VOTER—STATEMENT THEREOF ON OATH MANDATORY.—The provision of section 1475 of the Kentucky statutes requiring that a voter shall declare his disability on oath before his ballot can be marked for him by the clerk of the election, is mandatory to the voter, and a ballot so marked without the declaration on oath being made, is an illegal vote, and should be excluded.
2. ELECTIONS—BALLOTS SHOWN TO ANOTHER.—Ballots marked in the voting-booths either by the clerk of election or in his presence, were ballots "shown to another" within the meaning of section 1474 of the Kentucky Statutes, and should not have been deposited in the box, and if so deposited were illegal votes.
3. ELECTION CONTEST—EVIDENCE OF VOTER AS TO HOW HE VOTED INCOMPETENT.—The evidence of a voter as to how he voted at an election is incompetent as well in a contested election case where relief is sought from fraud, as upon the trial of an indictment of an election officer for making a false return. (Commonwealth v. Barry.)

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J. I. LANDES AND HARRY FERGUSON FOR APPELLANT.

1. It is provided by section 1475 Kentucky Statutes "that in case any person applying to vote shall declare upon oath that he is unable to mark his ballot it shall be *mandatory* on the clerk to mark his ballot in the presence of the other officers of election, and ballots otherwise marked shall be declared illegal and not counted."
2. The provision of section 1474 Kentucky Statutes prohibits the depositing of the ballot in the ballot box of any voter who shows his ballot to any person, after it has been marked, and any ballot thus deposited shall be declared illegal and not counted.
3. Testimony of voters to show how they voted in an action of contest based on the ground of fraud is *competent* and *admissible*, (Dixon v. Orr, 49 Ark., 238 (4 Am. St. Rep., 42); Boyer v. Teague, 106 N. C., 576 (19 Am. St. Rep., 599); Am. & Eng. Enc. of Law, Vol. 6, pages 426, 427, 430, 433; Johnson v. Commonwealth, 90 Ky. Rep., 57-8; McCrary on Elections, 3d edition, section 457, 468, 540, 541.)
4. The fact that officers of election leave their posts during voting hours does not require the votes cast at that precinct to be thrown out. (McCrary on Elections, section 137, 3d edition, 1887.)

C. H. BUSH AND JOE. McCARROLL FOR APPELLEE.

1. The statute requires all election officers to be appointed by the county court at the August term preceding the election, and the scratching out of the name of one who had been appointed at the proper time and inserting the name of another in the place thereof done in September was null and void, and the latter had no right to act. Besides, Allen, the last appointee, was not a housekeeper, as required by the statute.
2. It is true the statute requires a voter to make oath as to his disability before his ballot can be marked for him, but where the facts as to his disability are personally known to the election officers, the object of the statute is attained, and the oath is not necessary.
3. Where from considerations of public policy, voting is done by secret ballot, the courts will not authorize an investigation into the individual votes with a view to falsifying the returns made by the election officers. (Cooley's Const., Lim., side page 606, 5th edition; McCrary on Elections, sections 270 and 271,, sections 1467, 1468, 1471, 1479, 1472, 1474, 1569, 1570, 1571 Kentucky Statutes, 85 Ky., 600; Anderson v. Winfrey, 9 Ky. Law Rep., 184; Cowan v.

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Prowse, 93 Ky., 157; Hickman v. Hoffman, Hardin, 370; Slaughter v. McCain, 1 Mar., 485; Hoy v. McMurray, 1 Litt., 365; Scott v. Marshall, 5 J. J. M., 434; Pribble v. Hall, 13 Bush, 62; Dowell v. Mitchell, 82 Ky., 47; Ky. Stats., sec. 3760; Ramey v. Ratcliffe, 81 Ky., 469.)

4. Where in the absence of the clerk of the election and one of the judges the two remaining officers of election receive a number of votes and deposit the ballots in the box, and they are counted, the whole precinct should be thrown out, because there is no way of determining what the result would have been without those ballots.

JUDGE DuRELLE DELIVERED THE OPINION OF THE COURT.

The parties to this appeal were candidates at the November election 1894, for the office of justice of the peace for the Longview district of Christian county. Upon the face of the returns the Board of Canvassers found that appellee Barker received 443 votes, and appellant Major 371 votes, showing a majority of 72 in favor of Barker. Appellant duly gave notice of contest of the election, setting forth three principal grounds of contest, and appellee gave a counter notice, in which he relied upon certain irregularities which he claimed to have produced results favorable to appellant. The county board decided the contest in favor of appellee, and its decision was affirmed by the circuit court.

Appellant's grounds of contest were based upon alleged irregularities occurring at the Gordonfield precinct (No. 10), which was one of five precincts included in the district, and were as follows:

1st. The officers of election permitted the ballots of four voters to be stamped openly on the table of the clerk of election without requiring them to state under oath any disability which prevented them from marking their own

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ballots, and all of these ballots were so marked as to be counted and were counted for appellee.

2d. The clerk of that precinct accompanied eighteen voters into the voting booths and stamped or assisted those voters in stamping their ballots so that they should be counted for appellee.

3d. The officers at that precinct fraudulently counted forty-eight ballots for appellee which had been cast for appellant.

On the other hand the appellee, in his counter notice, relies on the fact that at the Longview precinct, which gave a majority for the appellant, a part of the officers absented themselves during part of the election hours, and that during the absence of the clerk one of the judges of the election acted in his place, and signed the clerk's name upon the back of the ballots.

There were some other grounds of contest urged by appellant, but they are immaterial except in so far as they tend to support the charge of fraud at the Gordonfield precinct.

Upon the first ground stated we are of opinion that the court should have sustained the contention of appellant and excluded from the count the ballots which were marked openly by the clerk of the election, without the statement under oath of disability required by the statute (section 1475 Kentucky Statutes). In our view the statute imperatively requires that the voter shall declare his disability *on oath* before his ballot can be marked for him by the clerk, and to permit the officers to assume, either from the voter's appearance or from their own alleged personal knowledge, that he is so disabled as to be unable to mark his own ballot, would be to open a door for wholesale evasion of the requirement of secrecy in the ballot. This rule may result in hard-

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ship to the individual voter in cases where the officers are neglectful of their duty in requiring the oath of disability to be made, but the requirement that the voter shall take the oath before his ballot can be marked and deposited in order that he may be punished if he make a false declaration is in our judgment mandatory to the voter. A ballot so marked, without the declaration on oath being made, is an illegal vote and should be excluded.

So also with the ballots which were marked in the voting booths either by the clerk of election or in his presence. These ballots were clearly *shown to another person* within the meaning of section 1474, Kentucky Statutes. They were forbidden to be deposited in the box, and were illegal votes if so deposited.

The testimony of the clerk shows for whom they were marked, and they should, therefore, be excluded from the count. The conduct of the clerk was, moreover, a gross violation of official duty, which it is difficult to ascribe entirely to ignorance.

This brings us to the consideration of the testimony of forty-eight voters who, with greater or less degrees of clearness, testify that they voted for appellant at the Gordonfield precinct. But twelve votes were returned as cast for appellant there, and it is insisted that the remaining thirty-six should be deducted from appellee's majority and counted in favor of appellant, which, excluding the votes hereinbefore indicated, would give a majority in favor of appellant.

It was held in Commonwealth v. Barry, 33 S. W., 400, that such evidence was not admissible upon an indictment for making a false return, but it is insisted that a different rule should apply to a case like the present one, where relief is sought on the ground of fraud.

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After full consideration of the question, we have concluded to adhere to the rule laid down in Commonwealth v. Barry. It is conceded that the voter can not be compelled by subpena to appear and testify how he marked his ballot. If he were permitted to so testify he could then be subjected to a moral compulsion from his party associates. One party might obtain from willing witnesses testimony which the other party would be powerless to rebut because unable to compel a statement of the truth. It is admitted that injustice may be done in individual cases by the application of this rule, but the consideration mentioned and the evident policy of the law that the secrecy of the ballot should be inviolable outweigh the occasional hardships.

As was said in the Barry case, "the election law provides ample means to prevent frauds and forgeries" if it is adhered to and enforced by the authorities.

The contention of appellant that the vote of the whole Gordonfield precinct should be thrown out on the ground of fraud can not be sustained. While the conduct of the election clerk in behalf of his brother, and other circumstances are calculated to give rise to grave suspicious, there is no sufficient evidence of fraud to justify us in disfranchising the voters of the entire precinct. And the grounds stated in the counter notice of appellee can not be sustained. The requirements of the statute which were violated by the officers at the Longview precinct were mandatory as to them but directory as to the electors, and there was no fraud or attempted fraud shown at that precinct.

Judgment affirmed.

Judge Paynter dissents.

Judge Landes did not sit in this case.

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CASE 54—PETITION ORDINARY—MAY 23.

Allen-Bradley Co. v. Anderson & Nelson Distilleries Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. ARBITRATORS—WHEN THEY HAVE POWER TO SELECT AN UMPIRE.—Arbitrators have no inherent power, upon their disagreement, to select an umpire, unless they are authorized to do so by the terms of the submission; and an award made by an umpire so selected is void. Arbitrators derive their power from the articles or agreement of submission, and the umpire must derive his in the same way.
2. ARBITRATION—AWARD AS TO MATTERS NOT SUBMITTED.—When arbitrators make an award as to matters submitted to them, and attempt in the award to determine matters not submitted to them, the award will be enforced as to the matters submitted, and treated as void as to the others. But in this case the whole award being void, this rule has no application.
3. CONSTRUCTION OF DEED.—There being several distilleries in the same vicinity owned by the same man, and using the same pumping station for their water supply, a provision in the deeds of conveyance to separate persons of the several distilleries that "when the property should be operated for use, the cost of operation and the ordinary expenses of repairing incident thereto should be paid by the distilleries using the water from said pump-house in proportion to the quantity of water used, determined by the number of bushels of grain crushed" means that each distillery is required to pay its share of the expenses of the pumping station only while using the water from the station, and, not when it procures its water supply elsewhere.

GRUBBS & MORANCY FOR APPELLANT.

No brief in the record.

HUMPHREY & DAVIE FOR APPELLEE.

No brief in the record.

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JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The Newcomb-Buchanan Company formerly owned four distilleries in the city of Louisville. This company failed and the property went into the hands of its assignee.

By proper conveyances the appellant, Allen-Bradley Company, became the owner of one of the distilleries, and the appellee, Anderson-Nelson Company, became the owner of three of them.

To supply their distilleries with water for the purpose of manufacturing whisky the Newcomb-Buchanan Company procured some ground some distance from the distilleries, on which it had dug a large well, about which the necessary machinery was placed to force the water into the pipes leading to the distilleries.

By the deed which the assignee of Newcomb-Buchanan Company made to the purchasers of the distilleries he conveyed the pumping station, the deed defining the rights of the parties thereto, and the proportion of expenses each should pay for operating the station, for the ordinary expenses of repairing incident thereto and for reconstruction, etc.

There appears in the deed language as follows, to-wit:

"*First*, That when the property should be operated for use the cost of operation and the ordinary expenses of repairing incident thereto should be paid by the distilleries using the water from said pump-house in proportion to the quantity of water used, determined by the number of bushels of grain crushed as reported to the office of the collector of internal revenue of the United States."

For the distilling seasons of 1885-6 and 1886-7, the Anderson-Nelson Company paid the expenses of operating the pump-house. A controversy arose between the parties over

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the expense account, particularly over the expense on account of operating the pump-house for the season of 1885-6.

The pump-house seems to have been operated ninety-five days during the season of 1885-6. The operation of the pump-house appears to have ceased about June 1, 1886. Instead of using the water for ninety-five days the Allen-Bradley Company claimed it had only used water for forty odd days, and that it should not pay any part of the expenses in operating the pump-house except when it was receiving water from the well. After much correspondence between the companies the matters in controversy were submitted to the arbitrament of Gen. D. W. Lindsey, who was attorney for the Allen-Bradley Company, and Col. John Mason Brown, who was attorney for the Anderson-Nelson Company.

There was no formal submission, but the letters which passed between the companies seem to have formed the basis of the submission. Anderson-Nelson Company contends that nothing was submitted except the "outstanding accounts" between the parties. The Allen-Bradley Company contends that it was not only the "outstanding accounts" but the question as to the interpretation of the provisions of the deed under which the pump-house was acquired. It is insisted for it that Allen-Bradley Company disputed the account because of the charges for part of the expense of operating the pump-house when it did not receive the water, claiming that under the contract it could only be so charged with such expenses when it was receiving the water; that this dispute necessarily involved an interpretation of the contract, and that the interpretation given it on the award is binding on the parties in the settlement of all future accounts for operating the pump-house.

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There was no agreement that the arbitrators should choose an umpire. Before they began the investigation the arbitrators selected Judge Alvin Duvall as umpire. The arbitrators could not agree upon an award, and, therefore, the *umpire made it.* It was not an award by those to whom the parties had submitted the questions in dispute.

Arbitrators derive their powers from the submission. An umpire must derive his in the same way. Arbitrators have not the inherent power to select an umpire unless they are authorized to do so by the terms of the submission. When an umpire is thus selected and makes the award it is a nullity. It is the action of a person who has no authority to determine the matters in dispute. (Daniel v. Daniel, 6 Dana, 98; Morse on Arbitration and Award, 245.)

The court below, in so far as the award of the umpire attempted to determine the accounts for the season of 1885-6, upheld the award. When arbitrators make an award as to matters submitted to them it will be enforced; and if the award determines matters not submitted to them, the award as to questions submitted will be enforced, and the award as to the matters about which no question was submitted will be treated as void. (Adams v. Ringo, 79 Ky., 211; Eddy's ex'or v. Northup, 15 Ky. Law Rep., 434.)

The award stated the principle which should control in the settlement of the accounts for the distilling season of 1885-6 under the deeds, and also as to how they should be settled for future distilling seasons. The award is that "The expenses of operating the pump-house during any distilling season are to be paid by the parties in the proportion of the number of bushels of grain mashed by each during that distilling season, whether using the water or not, inasmuch as each party has the privilege and right to use the water."

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The effect of the award is that should one of the distilleries run during a distilling season, or a part of one, and procure the water it needs for the purpose from any place other than the well, still it would be bound to pay the expense of operating the pump-house in the proportion of the number of bushels of grain mashed by each distillery during the distilling season.

The distilleries did not run during the season of 1887-8. They did during the seasons of 1888-9 and 1889-90, and Allen-Bradley Company paid the expenses of operating the pump-house during these seasons. The distillery seasons began in the falls of 1888 and 1889, and closed respectively in ——, 1889, and in June, 1890. Anderson-Nelson Company did not begin to take water from the well in the distillery season of 1888-9 until April 1, 1889, and the distillery season of 1889-90 until April 18, 1890, and continued from the dates named to take water from the well until the close of each season. Allen-Bradley Company used the water during the entire seasons.

This action is to recover of Anderson-Nelson Company its proportionate part of the expense for operating the pump-house during the distillery seasons of 1888-9, and 1889-90. The Allen-Bradley Company kept their account upon which it sues on the basis of the award, and seeks to compel the Anderson-Nelson Company to pay part of the expenses for operating the pump-house for several months in the distillery seasons of 1888-9 and 1889-90 when it was procuring at great expense its water elsewhere. If the award was void then neither is entitled to have it enforced.

The Allen-Bradley Company wants to enforce the entire award, while Anderson-Nelson Company wants it enforced in so far as it determined the accounts for the distilling sea-

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sons of 1885-6, but disregarded wherein it claims that the umpire went beyond and determined matters which were not submitted to Brown and Lindsey for arbitration. One part of the award was just as void as another part of it. The entire award being void, the rule that an award is enforcible so far as it determines the questions submitted and disregarded wherein it determines matters not in the terms of the submission, is not applicable. That rule is applicable when there has been a valid submission and the chosen arbitrators have made an award.

In this case the arbitrators did not make an award, and acts of the umpire were void, the question in dispute between the parties remained undetermined. Under the award made by the umpire Allen-Bradley Company would be compelled to pay part of the expenses of operating the pump-house in the seasons of 1885-6 when they were not getting water from the well. It appears it did not get any water from it in the months of April and May, 1886. The judgment of the court below sustains the award, wherein it has the effect that we have just stated.

The court below also held that Anderson-Nelson Company was not liable for the expenses of operating the pump-house when it was not receiving water therefrom.

The contention of the Anderson-Nelson Company that the award in the particular mentioned should be enforced is inconsistent with its claim that the award is void and obviously unreasonable and unjust.

The court below held that in making up the accounts between the two companies for the seasons of 1888-89 and 1889-90, and in defining the proportion of expense of operating to be paid by each company, the amount of water used by each company should be arrived at by ascertaining the num-

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ber of bushels of grain mashed as reported to the office of the collector of internal revenue of the United States from the time that the companies respectively commenced using the water until they ceased using it for the season. In this the judgment is correct.

The same rule must be applied in making up the accounts and determining the water used by each company for the distilling seasons of 1885-6 and 1886-7. For this purpose the case must be referred to the commissioner of the court.

The interpretation given the deed by the umpire in regard to the expense of operating the pump-house (and we are not to be understood as expressing an opinion as to the balance of it) is certainly not the proper one. It certainly was not intended that the company not using the water from the well should pay any of the expenses of operation while the other company was alone using the water. With the separate pump as now arranged it seems that no complication can arise in the future.

All questions not specifically passed upon by this opinion are undetermined by this court.

The judgment is reversed, with directions that further proceedings conform to this opinion.

CASE 55—PETITION EQUITY—MAY 29.

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e112 707

Trustees Church Home v. Morris.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. WILLS—EFFECT OF RENUNCIATION BY WIDOW.—Where a testator in his will gives the whole net income from his estate to his wife during her life, and provides for the distribution thereof at

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her death, upon her renunciation of the provisions of the will, the general rule is that the legacies which were to have been effective at her death, become immediately due, unless a contrary intention of the testator is manifest.

2. INTEREST ON LEGACY—FROM WHEN COMPUTED.—Although the legacy became due upon the renunciation of the will by the widow, there being a contest over the will the legacy could not be safely paid till it was decided, and interest should only be computed from that time.

HELM & BRUCE FOR APPELLANT.

1. The renunciation of the will by the widow had the effect to precipitate the maturity of the legacies. (Peynado v. Peynado, 82 Ky., 5; Wood v. Wood, 1 Met., 512; Curling v. Curling, 8 Dana, 38; Revised Statutes, chapter on Wills, p. 696; Gen. Stats., chap. 50, Art. 2, Sec. 2; Timberlake v. Parrish, 5 Dana, 345; Story's Eq. Jurisprudence secs. 1082, 3-4; Pomeroy's Eq. Jurisprudence, Vol. 1, secs. 468, 676 and 517; Firth v. Denny, 2 Allen (Mass.), 468; Jones v. Knappen, 22 Atl. Rep., 630; *In re* Ferguson's estate, 138, Penn. St., 209; Coover's Appeal, 74 Pa. St., 143; Young's Appeal, 108, Pa. St., 17; Gallagher's Appeal, 87 Pa. St., 200; *In re* Vance's Appeal, 141 Pa. St.; Heinman's Appeal, 92 Pa. St.; Steadfield v. Steadfield, 1 White & T. Lead Cases, 340; Brandenburgh v. Thorndike, 139 Mass., 102; Sander's Appeal, 65 Pa. St., 314; Plympton v. Plympton, 6 Allen, 178.
2. The legacies having become due the statute declares that specific pecuniary legacies shall bear interest after due.

BARNETT, MILLER & BARNETT FOR MORTON'S EXECUTORS.

1. The statute expressly provides that a legacy shall be payable one year after the testator's death, *if no time is fixed*; but the statute was not intended to operate so as to change the provisions of a will which expressly fixes "the time of the payment of the legacy to be at the death of the testator's wife." (Kentucky Statutes, section 2065.)
2. The testator, John P. Morton, died July 19, 1889, and his will was not established until this court affirmed the appeal on October 15, 1892 (14 Ky. Law Reporter, 360). "The establishment of the will was an essential prerequisite to the payment of the legacies." (Commonwealth v. Lillard, 4 Bush, 398; State v. Adams, 71 Mo., 620.)
3. The renunciation of the provisions of the will by the widow does

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not, as between specific and residuary legatees, precipitate the payment of the specific legacies, if it would work a hardship upon the residuary legatees. (Timberlake v. Parish's Ex'rs, 5 Dana., 353; Wood's Adm'r v. Wood's Devisees, 1 Met., 515; Jones v. Knappen, 63 Vt., 393; Firth v. Denny, 2 Allen, 468; Plympton v. Plympton, 6 Allen, 178; Dean v. Hart, 62 Ala., 308; Roe v. Roe, 21 N. J., 255; Maskell v. Goodall, 2 Disney, 282; Sandoe's Appeal, 65 Pa. St, 316; Coover's Appeal, 74 Pa. St., 143; Young's Appeal, 108 Pa. St., 17.)

4. In Peynado's Dev. v. Peynado's Ex'or, 82 Ky., 6, relied upon as authority for precipitating the payment of the specific legacies; and also in Curling's Adm'r v. Curling's Heirs, 8 Dana, 38, cited in the Peynado case, there was no specific legacy to interfere with the residuary legacy by the precipitation.

The Peynado case also cites the Woods case, 1 Met., 512, where there was a specific and a residuary legacy, in which case this court not only refused to follow the general rule but said, "the application of this general rule will depend in *each case*, upon the effect it produced on the rights of the other devisees in the will."

SAMUEL B. KIRBY FOR APPELLEES.

1. Under the circumstances of this case no interest should be collected upon the legacies. (Kentucky Stats., secs. 4851, 2065 and 3859; Com. v. Lillard, 4 Bush, 398; State v. Adams, 71 Mo., 620.)
2. This case belongs to that class which is excepted from the operation of the general rule which precipitates the enjoyment of the legacy to the remainderman when the widow renounces the provisions of the will; the widow's renunciation did not extinguish her title, and the rule of equity which sequesters the rejected benefit and applies it to the compensation of a devisee who has been disappointed by reason of the election of a refractory donee, should prevail. (Story's Eq. Jur., secs. 1082, 1083, 1084; Pomeroy's Eq. Jur., Vol. 1, secs. 468 and 517; Williams on Ex'ors, side page 1449; Woerner's Amer. Law of Adm'rs, 119; Firth v. Denny, 2 Allen (Mass.), 468; Jones v. Knapper, 63 Vermont, 393; Maskell v. Goodall, 2 Disney (Ohio), 282; Sandoe's Appeal, 65 Pa. St., 316; Coover's Appeal, 74 Pa. St., 143; Young's Appeal, 108 Pa. St., 17; Plympton v. Plympton, 6 Allen (Mass.), 178; Roe v. Roe, 21 N. J., 255.)
3. Next to the widow the legatees were the chief object of the testator's bounty, and his wishes with respect to them can only be carried out by withholding the legacies until the death of the

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widow, or until the accumulations of the estate shall make up to them their loss.

4. The testator contemplated no other scheme of distribution than that directed in his will, and to precipitate the payment of the legacies to the hurt and injury of the appellees would be a violation of his plain and expressed intention.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

By the will of John P. Morton the net income of his entire estate was to go to his wife so long as she lived. Upon her death the estate was to be distributed as follows: (Item 4.) To J. H. Morton Morris, $5,000; Ellen M. Goodloe, $3,000; Mary Belle Griswold, $1,000; Morton Morris, Jr., $1,00' Morton Griswold, $1,000, and Margaret M. Becker, $500.

Then follows a clause giving to the appellant, a charitable institution in Louisville, the sum of $40,000. In a succeeding clause the sum of $10,000 is set apart for the construction of buildings on the lot of the Orphanage of the Good Shepherd, where mechanical education might be furnished the inmates of the orphanage. This, however, was on condition that a like sum should be furnished by others which was not done.

By another clause the testator provided that if there still remained a surplus, and enough for that purpose, the sum of $20,000 was to go to the appellant for investment for the use of the boys cared for at the Orphanage of the Good Shepherd, and the income of which was to be paid them when they reached maturity, etc.

Then, after disposing of a fruit grove in Florida, to a number of persons, the last item of the will provided as follows: "After all the foregoing devises are provided for in full, in the order named, and there yet remains a surplus from any and all sources, the same shall be divided into five equal parts, and one part each shall pass to the first five

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of the several beneficiaries named in item (4) four."

The will was probated in the county court of Jefferson county in July, 1889, but was contested, and the mandate of this court affirming the judgment below establishing the will was entered in October, 1892. Pending this contest, however, the widow renounced the provisions of the will. This was done on March 12, 1891.

By appropriate proceedings the interest of the widow has been allotted to her, the effect of which allotment, growing out of her renunciation of the will, has been to withdraw from the estate some fifty-odd thousand dollars. If the distribution of the remainder of the estate is now made the residuary legatees will get much less than if it is postponed until the widow's death, the income of it in the meantime being set apart for their benefit.

The judgment below postponed the distribution until the death of Mrs. Morton unless in the meantime the accretions of the estate shall equal the amount withdrawn by her, in which event the distribution was to be made, giving the appellant the $60,000 without interest, and giving the residuary legatees—the appellees here—the entire balance. The correctness of this judgment is the sole question on this appeal.

The only reason we conceive for the testator's postponement of the distribution until the death of his widow was that she might be provided for, and when the reason for postponement ceased, as it did upon her renunciation, we can not see why those who were the chief objects of the testator's bounty should be delayed in the enjoyment of their legacy.

While the amount of the residuary estate is lessened to the extent of the widow's allotment, they can not complain

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because they were only to get what was left after payment in full of the specific legacies. They are benefited to some extent because they get their specific legacies at once, instead of waiting until the widow's death; and it is not for the court to attempt an adjustment of their profit and loss account by withholding from the principal object of the testator's solicitude the estate intended for them.

To the extent that the testator intended to *prefer* the appellees or make it *certain* that they should get a part of his estate, he provided for them in item 4 of his will; as to whether they would get any further estate, he left in uncertainty and indeed expressed a doubt as to whether there would be enough to pay the $20,000 mentioned in the will, and still further indicated a doubt in the last clause by basing the residuary devise on the questionable condition of there still remaining a surplus of the estate.

The general rule is well settled that a renunciation of the will by the widow under circumstances like the present has the effect of precipitating the maturity of the legacies.

The rule is thus stated in *In re* Ferguson's Estate (1890), 20 Atlantic Rep., 945 (Pa.): "It was held in Coover's Appeal, 74 Pa. St., 143, that devises or bequests, subordinate to a life estate in the widow and contingent upon her death or payment of which is postponed until then, become presently payable upon her election to take under the intestate laws. As to its effect upon all claims under the will her election is equivalent to her death. This is the general rule, and if there are any exceptions they must depend on the expression or unavoidable implication of a contrary intent of the testator." And the opinion of the lower court in that case that, "as the residuary legatees would be disappointed in the amount coming to them, which would be diminished

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by the half of the personalty taken absolutely by the widow, they should be compensated out of the benefits intended to be conferred on the widow," was reversed under the rule announced.

We are aware that there are exceptions to the rule, but the intention of the testator must prevail so far as it can be ascertained. That is higher than any equitable rule adopted to carry out what may seem to a court a more equal or just distribution of the estate.

There is no reason whatever, in this case to depart from the direct command of the testator to distribute this estate in the manner in which he directs it to be done. It might be different if an intention was apparent to benefit certainly the residuary legatees, and the bulk of the estate was expected to be left for them. In such event they, and not others, could be said to be the chief objects of the testator's bounty, and they would be protected, not because it would be equitable or just, but because such was the intention of the testator.

The question remains, when shall the legacies begin to bear interest? We have seen that they became due upon the renunciation of the will by the widow, which was in March, 1891, but there was a contest over the will, and the executors could not pay until that was settled. This was done in October, 1892, and then, for the first time, the payment could safely be made. It seems to us interest should be computed from the last-named date.

Judgment reversed for proceedings consistent with this opinion.

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CASE 56—PETITION EQUITY—MAY 29.

Bullitt, et al v. Eastern Kentucky Land Co.

APPEAL FROM MENIFEE CIRCUIT COURT

1. RESCISSION OF LAND SALE—RIGHT OF VENDEE TO LIEN.—When a contract for the sale of land is rescinded the vendee has a lien upon any part of the land owned by the vendor, for any sum which he may have paid upon the purchase price, whether the vendee was in possession thereof or not.
2. ACTIONS FOR RESCISSION, AND TO ENFORCE LIEN ON LAND—JURISDICTION.—An action purely for a rescission of a contract for the sale of land is transitory, being an action *in personam;* but when in such an action it is further sought to enforce a lien on land which results from the rescission, then the action becomes local and the jurisdiction is in the county where the land lies, whether the defendants are served with process there or not.
3. LIMITED WARRANTY—EXTENT OF JUDGMENT UPON RESCISSION.—Where two vendors in a contract of sale warranted generally—one as to forty per cent. of the land and the other as to sixty per cent.—upon rescission and judgment against them for what had been paid on the land, the judgment should not have been against them jointly for the full amount, but only against each of them in the proportion named.
4. SPECIAL JUDGE—PRESUMPTION THAT HE HAD THE ORDERS ENTERED. Where a special judge is selected by agreement, or elected to preside in a case, the presumption is that such orders as are entered in the case were made by him, unless the contrary is shown by the record.

W. B. DIXON FOR APPELLANTS.

1. Action for specific performance is transitory. (4 Mon., 436, Austin v. Bodley; 3 J. J. M., 544, Parish v. Oldham; 3 Bush, 135, Page and wife v. McKee.)
2. Action to rescind contract is transitory. (3 Dana, 34, Kendrick v. Wheatley.)
3. Summoning defendants in Menifee county did not give jurisdiction. (4 J. J. M., 393, Gill v. Corbin; 5 J. J. M., 126, Prewitt v.

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Graves; 2 Duvall, 182, Duvall v. Parker; 2 Bush, 55, Casey v. Lewis; 3 Met., 459, Fernold v. Spear; 7 Bush, 432, Meguiar v. Rudy; 18 B. M., 136, Dean v. English.)

4. Appellee's prayer for enforcement of a lien did not give jurisdiction. (Litt. S. C., 280, Hayden v. Delay; 3 Mon., 49 Oldham v. Woods; 2 Met., 433, Goghegan v. Ditto, &c.; 4 Bush, 241, Spears v. Sewell; 83 Ky., 565, Ushur's ex'r v. Flood; 88 Ky., 575, Dean v. Cassidy, &c.; 1 Bibb, 277, Scott v. Coleman; 1 Bibb, 313, Bibb v. Prather; 3 A. K. M., 177, Griffith v. Depew; 5 Litt., 92, McCampbell v. McCampbell; 5 Mon., 408, Brown v. East; 6 Mon., 388, Payne v. Wallace; 4 J. J. M., 162, Funk v. McKeonu; 5 Dana, 229, Samuel v. Sayre; 5 Dana, 576, Shepherd v. McIntire; 8 B. M., 566, Rucker v. Abell; 1 Bush, 238, Miller, &c., v. Hall and Wife; 9 Bush, 40, Holtzclaw v. Blackerby, 2 Dana, 113; Vaughan v. Myers; 6 B. M., 120, Barbour v. Meyers' adm'r; 1 Duvall, 34, Allen and wife v. Shortridge, &c.)
5. The burden was on appellee to show jurisdiction. (Code, Sec. 78; 2 Duvall, 540, Ruby v. Grace; 4 Bush, 349, and 5 Id., 506, Dyas v. Lindsey.)
6. Mr. Vanarsdell had authority to act as special judge. (General Statutes, chap. 22, art. 7.)
7. Pleadings did not throw on appellants the burden of proving title. (3 Bibb, 302, French v. Howard; 6 J. J. M., 515; Vittitoe v. Jones, 7 Bush, 7, 8, Davis v. Dycus; 78 Ky., 612; Logan and wife v. Bull, &c.)
8. The rescission was not authorized by the pleadings. (2 Bibb, 567, Finley's ex'r v. Lynch; 4 Bibb, 215, Grant v. Combs; 1 Mon., 168, Cates v. Raleigh; 6 Mon., 282, Grant v. Combs; 3 Dana, 25, Pollock v. Wilson; 8 B. M., 123, Winston v. Gwathmey's heirs; 3 Mon., 517, Durrett v. Simpson's rep's; 3 J. J. M., 663, Lytle v. Breckenridge; 5 B. M., 416, Wills v. Porter.)

THOS. W. BULLITT ON SAME SIDE.

1. Upon *amended petitions, no process* having been issued or served upon the appellants, under the code they were not bound to take notice of the filing. Furthermore filing of such pleadings could only be authorized by the special judge who had been agreed upon as judge by the parties.
2. Evidence pertaining to property particularly described in the deeds obtained from the several parties, is incompetent; it fails to identify said property as the property sold by appellants to appellee. Furthermore, depositions in regard to surveyor's plat are incompetent because they fail to show the correctness of said plat.

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3. Evidence pertaining to certain special pleadings is incompetent, because: 1st. The appellee by its original or amended petition fails to pray that appellants be required to interplead with their co-defendants or that the latter be required to interplead with the appellants. 2d. By the failure of any of the answers to be made cross petitions, there is in fact no interpleader between these parties. 3d. The judgment recites as the basis in part for its rendition that certain of the co-defendants (named), and others (not named), were in possession of a material part of the land sold by appellants, but, (1) It is not alleged in any pleading that certain of the co-defendants (named), were ever in possession of any part of said land. (2) Other co-defendants (named) the principal claimants, were first made defendants after appellants' answer had been filed and on said amended petition *no process* was served. (3) Another co-defendant (named), was first made defendant by an amended petition filed, on which no process was served on appellants. (4) The judgment in reference to other co-defendants (named), fails to define what part of said land they were in possession of.
4. The answer of the appellants traversed every material allegation of the petition. The appellee took no proof in support of it and gave no notice to take depositions. Giving notice to take depositions on behalf of parties with whom appellants had no controversy and afterwards attempting to use them in behalf of appellees would result in a fraud upon appellants.
5. By the reading of the contract in which the appellants are expressly exempted from the obligation of conveying any particular quantity of land, and in which it is furthermore provided that if the land shall fall short of a certain number of acres, appellee is to pay for only so much as good title may be given to, although if land should run over said certain number of acres, the appellee only pays a fixed sum named in contract, therefore it was in contemplation of the parties that there might be a shortage; and that being the case, such shortage is not a ground for cancellation of contract

A. T. WOOD FOR APPELLEE.

1. After judgment by default, defendants having been summoned in another county, subject themselves to the jurisdiction of the court for all purposes by motion to vacate and set aside such judgment.
2. An action for specific performance of a contract for sale of land and for a judgment for purchase money paid, with a lien on whatever lands vendor owned in the boundary, must be brought

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in the county where the land lies, and the court having jurisdiction for enforcing the contract also has jurisdiction to render a personal judgment for purchase money, although defendant was not summoned in the county. (93 Ky., 6.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

By executory contracts the Bullitts conveyed to the Eastern Kentucky Land Co., a boundary of land situate in Menifee county, supposed to contain 3,000 acres, for the sum of $5,000—$2,500 was cash and the balance was to be paid under certain conditions of the contract. If there were less than 3,000 acres in the boundary then the price was to be at a given sum per acre, and in no event was the price for the whole boundary to be more than $5,000. This action was instituted by the appellee in the Menifee Circuit Court to rescind the contract to recover the sum paid thereon and to enforce a lien therefor on whatever part of the boundary of land which belonged to the Bullitts.

The contract required the vendors to free the land of squatters and place the vendee in possession of it. It was alleged that the vendors had failed to do either; that parts of the land were in possession of squatters; that the vendees could not comply with the terms of the contract by making a deed with covenants of general warranty, etc. The alleged squatters were made defendants to the action and served with process in Menifee county. The Bullitts, who resided in Jefferson county, were served with process in that county. If the contract was rescinded and any part of the land embraced in the contract belonged to the vendors we are of the opinion the vendee had a lien thereon to reimburse it for any sum which it had paid the vendors on the purchase money, notwithstanding the vendor failed to place it in possession of the land. In many cases in this court where the

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vendee had taken possession of land under a purchase, and afterwards the court rescinded the contract, the vendee was adjudged a lien for such purchase money as he had paid the vendor. In these cases the court recited the fact in its opinion that the vendee was in possession under his purchase.

While the court recited the fact of the vendee's possession it did not hold in terms that the vendee would not have been entitled to the lien except for such possession.

One who enters upon land under a parol contract can not maintain an action to enforce it, but he has a lien upon it for whatever he may have paid for or improvements made on it. (Speers v. Sewell, 4 Bush, 239; Usher's ex'or v. Floyd, 83 Ky., 563.)

It is a resisting equity, and the court will not deprive the vendee of his possession until he is reimbursed. In such states of case courts of equity endeavor to place the parties in *statu quo* as it does in cases of rescission of contracts of sales of land. We can see no reason for the rule which would deny a vendee a lien upon the land for the money he had paid the vendor simply because the vendor had broken his contract in failing to place the vendee in possession of the land. The equitable title to whatever land the vendors actually owned within the boundary sold was conveyed to the vendee. If there is a rescission of the contract the vendee should not be compelled to surrender this equitable title to the land until it has been reimbursed the sum paid the vendor.

In Bibb v. Prather, 1 Bibb, 316, it does not appear whether or not the vendee had been placed in possession of the land. The contract was rescinded and the court adjudged that the lien existed.

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In Miller v. Hall, 1 Bush, 237, the inference is that the bidder at a judicial sale did not get possession of the land, but the court held that for the money he paid before the judgment under which the sale was made was superceded or appealed from he was entitled to a lien on the land.

In Vaughn v. Myers, 2 Dana, 113, the conveyance was set aside which was made under a sale by the sheriff under an execution against Myers, and the court held as Myers was insolvent it was proper to allow Vaughn (the purchaser) a lien on the land conveyed to him to recover the payment of the sum paid by him to the sheriff. The vendee does not appear to have been in possession of the land, but as Myers was insolvent the court adjudged the lien. The question of possession did not enter into the consideration of the case. The court, in adjudging a rescission and allowing a lien to the vendee for reimbursement in Barbour v. Morris' adm'r, 6 B. M., 120, did not state whether or not the vendee was in possession, and, of course, did not adjudge the lien because the vendee was in possession of the land. An action purely for a rescission of a contract of sale of land or its specific execution is transitory—not *in rem* but *in personam*. (Kendrick v. Wheatley, 3 Dana, 34; Parish v. Oldham, 3 J. J. M., 544.)

When in the action it is sought to enforce a lien on land which results from the rescission then the action becomes local.

In Kendrick v. Wheatley, *supra*, the court held that the action could not be maintained in the county where the land was situated as the defendants neither resided in that county, nor were they served with process therein, and that the allegations of the bill were not sufficient to authorize a decree for the sale of the land. It was alleged that the

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vendor of the land had *no title* to it. Certainly if the vendor had no title to the land there could not be a lien adjudged upon it, hence the court would not be authorized to decree a sale of land belonging to one other than the vendor. In this case it was not alleged in the petition that the vendors had *no title* to the land, but that squatters were in possession of and claiming a part of it. It follows that some part of it is conceded to have been the property of the vendors, and upon which a lien could be adjudged and enforced. The petition was not as definite as it should have been, but the court upon motion, would have compelled the plaintiff to have made it more so.

"Action must be brought in the county in which the subject of the action or some part thereof is situated. * * 3. For the sale of real property. * * under a mortgage lien or other encumbrance or charge except for debts of a decedent." (Section 62, Civil Code.)

Having reached the conclusion that there is a lien upon part of the boundary sold if a rescission was adjudged, therefore, the Menifee Circuit Court had jurisdiction. We can not believe that the vendee should be required to bring its action in Jefferson county or some county in which the vendors could be served with process, and if it succeeded in having the contract rescinded then to bring another action in Menifee county to enforce its lien.

The plaintiff failed to take any testimony to sustain the allegations of its petition as amended. The report of the surveyor simply showed the boundaries of the tracts of land sold by the Bullitts to the plaintiff and the boundaries claimed by the defendants (other than the Bullitts) within that boundary. It was not evidence of the character of the claims of the several defendants to their respective bound-

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aries. It did not furnish evidence that their claims were valid or adverse to the Bullitts' title. The depositions taken by the defendants could not be used against their co-defendants, the Bullitts. It follows from these conclusions that the evidence did not authorize the judgment.

In the contract of sale T. W. Bullitt warranted generally as to 40 per cent. of the land, and Joshua F. Bullitt as to 60 per cent. of it. The judgment for $2,500 and interest was against them jointly and did not specify what part each should pay. This was an error. If upon a return of the case the court should rescind the contract then the court should adjudge that T. W. Bullitt should pay 40 per cent. of the amount and Joshua F. Bullitt 60 per cent. of it. When from any cause the regular judge can not act and a special judge is selected by agreement of the parties, or elected to preside in the case, then such orders as are made in the case are presumed to have been made by such judge unless the contrary appears in the record. If such special judge fails to attend and try the case an election can be held to select another special judge for the purpose. Upon a return of this case either may amend their pleadings or file such additional ones as the court may deem necessary to complete the issues.

The case is reversed, with directions that further proceedings conform to this opinion.

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CASE 57—PETITION ORDINARY—MAY 29.

99 332
116 906

Louisville & Nashville Railroad Co. v. Webb.

99 332
116 906

Same v. Same.

99 332
117 777
118 605

99 332
134 836

APPEAL FROM HOPKINS CIRCUIT COURT.

1. PEREMPTORY INSTRUCTION—LIABILITY OF A RAILROAD COMPANY FOR INJURY TO CHILD.—Upon the trial of an action for damages against a railroad company for injury to a child, it appearing from the plaintiff's evidence that on the day the injury was received the eleven-year-old boy boarded the freight train without the knowledge or consent of the conductor for the purpose of riding a short distance to a water-tank, and reached there in safety and got off the train; but after the train had started again, without the knowledge of the conductor and not within his sight, he caught hold of a ladder handle for a short time, and afterwards in jumping from the train landed on a pile of coal alongside of the track, part of which slipped under his feet and threw him under the train whereby he lost one of his feet, a peremptory instruction to find for the defendant should have been given.
2. PROXIMATE CAUSE.—The immediate or proximate cause of the accident, under these circumstances was the dislocation of the lumps of coal when his feet struck the pile, whereby his foot was thrown under the cars.
3. EVIDENCE.—Testimony as to what the conductor said to the boys on days previous to the day the accident occurred, and the testimony that the conductor and brakemen had on previous days encouraged the boys to catch hold of the ladders and swing therefrom, was inadmissible.
4. RES GESTAE.—A statement of the conductor after the train had run some distance and stopped, and he had returned to the place of the accident, was not competent as part of the *res gestae*.
5. CONTRIBUTORY NEGLIGENCE—WHAT CONSTITUTES IN A CHILD.—A child is required to exercise only such a degree of discretion and care as may be reasonably expected of one of his age and intelligence under like circumstances; but age alone is not the test of the degree of care required of children in such cases.

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6. RIGHT OF RAILROAD COMPANY TO PLACE COAL ALONG ITS TRACKS FOR ITS USE.—The placing of coal by a railroad company along its tracks, for its own necessary use, is not negligence, and not likely to be the cause of any such accident as happened in this case.

B. D. WARFIELD FOR APPELLANT.

1. The conductor of the train did not invite appellee to ride on the train, but when he found him there made him come inside of the caboose and stay until the train stopped, when he ordered him to *get off* and *stay off*. Appellee again got on the train of his own volition without the knowledge of the conductor and it was then he was hurt. The conductor did not tell appellee on the day that he was hurt that if he would load freight, he (the appellee), could ride on the train, therefore conductor was guilty of no negligence.
2. Appellant should not be held liable for appellee's accident when his action was in violation not only of a prudence which a boy of appellee's age should be expected to show, but also of a statute of the State of Kentucky. (212, Ch., 171, Acts of Kentucky, 1891-2-3, page 708; Ky. Stat., 805.)
4. Even though conductor had permitted the boy to ride on the train a certain distance and had then ordered him off, and appellee in express violation thereof had once more gotten on the train and had then been hurt, the conductor's act in allowing the boy to ride said certain distance had no *proximate* connection with appellee's injury, therefore the appellant can not be held liable. (Shearman & Redfield on Negligence (4th Ed.), sec. 261; 19 Amer. & Eng. Enc. of Law, 301; L. & N. R. Co. v. Hunt by &c., 11 Ky. Law Rep., 825; City of Covington v. Bramlege by &c., 14 Ky. Law Rep., 395; P. & M. R. Co. v. Hoehl, 12 Bush, 43; McVeagh v. A., T. & S. F. R. Co., 18 Amer. & Eng. R. Cases, 651.)
5. A boy of appellee's age must exercise what is to be regarded as a reasonable precaution for one of his years for his own safety. (P. & M. R. Co. v. Hoehl, 12 Bush, 43; Moore & wife v. P. R. Co., Supreme Court Penn., 1882; 4 Amer. & Eng. Railroad Cases, 569; Shearman v. H. & St. J. R. Co., 72 Mo., 62, 4 Amer. & Eng. R. Cases, 589; Williams & wife v. Texas & Pac. R. Co., Supreme Court of Texas, 1883, 15 Amer. & Eng. R. Cases, 403; Atchison &c. R. Co. v. Flinn, 24 Kansas Rep., 1 Amer. & Eng. R. Cases, 240; Woodbridge v. Delaware &c. R. Co., 105 Pa. St., 460; Erwin v. St. Louis, I. M. & S. R. Co., Supreme Court of Mo., 1888, 35 Amer. & Eng. R. Cases, 390; A., T. & S. F. R. Co. v. James Smith, &c., 8 Amer. & Eng. R. Cases, 327; Wm. Nolan v. N. Y. & N. H.

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R. Co., 25 Amer. & Eng. Cases, 342; Sullivan v. Louisville Bridge Co., 9 Bush, 90.)

6. Evidence of negligence that could not have contributed to the accident or injury complained of should not be admissible. (L. & N. R. Co. v. Fox, 11 Bush, 505; L., C. & L. R. Co. v. Sullivan, 81 Ky., 624; Ramsey v. L. & N. R. Co., 89 Ky., 99; Johnson's Adm'r v. L. & N. R. Co., 91 Ky., 651; Lewis v. Flint & Pere Marquette R. Co., Supreme Court of Michigan, 1884, 18 Amer. & Eng. R. Cases, 263; Henry v. St. L., K. C. & N. R. Co., 76 Mo., 288; 12 Amer. & Eng. R. Cases, 136; Bangs v. Syracuse B. & N T. R. Co. (New York, 1886), 28 Amer. & Eng. R. Cases, 499; South Side Passenger R. Co. v. Trick and wife (Pennsylvania Supreme Court), 34 Amer. & Eng. R. Cases, 549.)
7. The conductor had no authority to carry passengers on this train, nor to hire outside persons to help load freight nor to permit them to ride on his train for such services, and if he did employ such services upon such consideration his acts in this behalf were wholly outside of the scope of his authority and therefore the company should not be bound by them.

GORDON & GORDON ON SAME SIDE.

1. The motion for a peremptory instruction should have been sustained because there was a total failure of evidence to sustain the allegations of negligence, of any employe of appellant which caused or contributed to the accident; on the contrary it showed conclusively that Willie Webb was guilty of negligence which immediately and directly caused the injury.
2. An eleven year old boy of ordinary intelligence, and bright, and active, is not of such tender years, that he can not contribute to his own injury by his own negligence. (Covington vs. Bamlege, 14 Ky. Law Rep.; Shearman & Redfield on Negligence, page 63.)
3. It was error to permit evidence to go to the jury as to what the conductor said on days previous to the accident complained of.
4. There being no conflicting evidence as to whether or not the boy was of sufficient age, intelligence and judgment to understand or comprehend the dangers incident to a moving train, that was a question for the Court.
5. The proximate cause of an event is "that which in a natural and continuous sequence, unbroken by any new cause, produces the event, and without which the event would not have occurred." A remote cause is "one which has so far expended itself that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took

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advantage of to accomplish something not the natural or probable effect thereof. (Shearman & Redfield on Negligence, 4th Ed., Secs. 261, 19 Amer. & Eng. Enc. of Law, 301.)

6. Though the defendant was guilty of negligence, if there was such negligence on the part of the plaintiff, but for which the injury could not have happened, still the plaintiff can not recover. (P. & M. R. Co. vs. Hoehl, 12 Bush, 43; Sullivan vs. Lou. Bridge Co., 9 Bush, 90; Ramsey vs. L. & N. R. Co., 89 Ky., 99; Johnson vs. L. & N. R. Co., 91 Ky., 651.)
7. Where the facts are undisputed the question as to whether a certain act was the approximate cause of the accident, is a question of law for the court. (Henry vs. St. L. R. Co., 76 Mo., 288; 12 Amer. & Eng. R. Cases, 136.)
8. The Court should have given the instruction asked by appellant telling the jury that appellant had a right to place the pile of coal along its track, and that so doing was not negligence.

WM. LINDSAY ON SAME SIDE.

1. The instructions assume that there was evidence tending to show that the boy swung from the train, whilst aboard, at the instance and with the consent of the conductor, and defined the duty of the train-people under that state of fact. There was no evidence upon which to base this assumption.
2. There is a marked distinction between the degree of care the conductor was bound to exercise whilst the boy was on the train, and after he had left it in safety, and without any authority to again get on it. The conductor had no knowledge and no reason to believe that the boy contemplated jumping on the moving train.
3. It was certainly error to instruct the jury that appellant's conductor owed any such duty to the boy after he had been put off the train in safety, as to make it gross negligence in him not to anticipate that the boy would swing to the train as it moved out.

H. W. BRUCE ON SAME SIDE.

No brief in the record.

EDWARD W. HINES FOR APPELLEES.

1. A conductor of a freight train is guilty of negligence in inducing a boy to ride upon his train, when he had reason to anticipate that the boy would attempt to swing upon the train while it was moving.
2. The testimony of the boy's companions is competent to show that

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the conductor had knowledge of and encouraged the practice of the plaintiff and his companions in swinging on the moving train.

3. The plaintiff being on the train at the conductor's invitation, the conductor voluntarily takes upon himself for the time being guardianship of said plaintiff, therefore said plaintiff being on the train at the conductor's invitation the company which he represents is liable. (Railroad Co. v. Stout, 17 Wallace, 657; Bransom's Adm'r v. Labrot, 81 Ky., 683; L. & N. R. Co. v. Popp by, &c., 16 Ky. L. Rep., 369.)
4. The infant plaintiff exercised such care as a child of like age could be expected to show and he could be held accountable no further. (Beach on Contributory Negligence, Sec. 46; Paducah &c., R. Co. v. Hoehl, 12 Bush, 49; Plumbey v. Birge, 124 Mass., 57; Penn. R. Co. v. Kelly, 31 Pa. St., 378.)
5. When passengers have been received upon a freight train without notice that it is in violation of the rules of the company they are entitled to all the rights of passengers, and the company is liable to them as passengers for injuries resulting from the negligence of its servants in charge of the train. (McGee v. Missouri Pac. R. Co., 1 Amer. St. Rep., 706.)
6. If the conductor had reason to anticipate that the appellee would swing on the moving train and did not warn him, the company is liable whether the conductor did or did not extend invitation to appellee, or even if the appellee was a trespassesr. (Brennan v. Fair Haven, &c. R. Co., 45 Conn., 295; Pittsburg, &c. R. Co. v. Caldwell, 74 Pa. St., 421; Indianapolis &c. R. Co. v. Pitzer, 109 Ind., 179; Birford v. Johnston, 82 Ind., 426.)

WADDILL, NUNN & WADDILL ON SAME SIDE.

No brief in the record.

JUGDE LANDES DELIVERED THE OPINION OF THE COURT.

By agreement these two cases were heard together in this court. They originated in the circuit court of Hopkins county, and the first named case was an action brought by Willie Webb, an infant, suing by his father, W. H. Webb, as his next friend, to recover from the appellant damages for the loss of his right foot and ankle, alleged to have been the result of the negligence of the servants and agents of

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the appellant in charge of one of its freight trains on what is known as the Henderson division in the system of railroads owned and operated by the appellant. The other case was an action brought by the said W. H. Webb to recover damages against the appellant for the loss of the services of his said son, and the expenses incurred by him in procuring the necessary surgical attention, etc., for him during the period of his suffering from the aforesaid injuries, and all alleged to have been occasioned by and to have been the result of the same negligence and wrongful acts that were alleged in the first-named action as the ground of recovery therein. Both cases are based upon substantially the same state of facts.

In the action of the infant appellee the jury rendered a verdict in his favor, and fixed the damages at the sum of $5,000, and in the other action the jury rendered a verdict in favor of the father, and awarded him the sum of $400, and a judgment having been rendered on the verdict in each case, and the court having refused to set aside the verdicts and grant the appellant new trials, the cases have been brought before us by appeal and a reversal of the judgment in each case is sought for various alleged errors, which will be noticed as far as the merits of the cases may require.

The accident occurred and the injury was inflicted upon the infant appellee at the Deer creek water tank on the line of the appellant's railroad, situated about three miles south of Sebree City, in Webster county, on the 9th day of August, 1893. Four days before that date he reached the age of eleven years. He was living with his father and step-mother at Sebree City, and from the testimony detailed by his witnesses before the jury on the trial of his case, much of which was objected and excepted to at the time by

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counsel for the appellant, we gather substantially the following state of facts in his case: The infant appellee and several boys at Sebree City, who were his companions and of about his age, had occasionally assisted in unloading freight at the depot from the appellant's local freight train previous to the day on which the accident occurred, and so employed themselves on the day before; this local freight train ran regularly between Howell, near Evansville, Ind., and Earlington, in Hopkins county; on such occasions the conductor, Peter J. Herb, in charge of the train, encouraged the boys to assist in unloading freight by promising them that they might ride on the train from Sebree to the water tank, and did permit them to take the ride; the infant appellee had ridden twice on the train to the tank before he was injured; on the day before he was injured he and the other boys carried watermelons from the train, and on that day they rode on the train to the tank; when they rode to the tank they walked back to Sebree; on the day he received the injury the infant appellee was not at the depot when the train arrived, but other boys were there, and assisted in unloading freight, the conductor having promised them the ride if they would do so; the infant appellee did not on that day assist in unloading freight, and the conductor did not say anything to him about it, and did not promise him a ride to the tank, and did not invite or request him to ride there on the train, but the infant appellee reached the depot while the other boys were unloading and saw them at work, and just before the train started from the depot on its journey southward, and towards the tank, he and some of the other boys boarded the caboose, which was in the rear of the train and was standing several car lengths back from the depot platform, and other boys boarded some of the other cars.

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There was no proof that the conductor saw the infant appellee board the caboose, but the proof does show that the conductor was standing on the platform when the train started, and that he jumped or swung himself on the caboose from the platform while the train was in motion, and that he saw the infant appellee in the caboose after he entered it, and that he did not stop the train to put him off before it reached the tank, where it stopped to take on a supply of water for the locomotive.

The train was a long one, and it arrived at the tank without accident or injury to any one, and after it stopped, and while water was being taken from the tank, the infant appellee and the other boys got safely off and ran along the side of the standing train to the tank, where the infant appellee took a drink of water. He and some of the other boys then went back towards the rear of the train, and after the train had started from the tank, and while it was in motion, the infant appellee and other boys took hold of the ladders on the side of the cars and swung to them, and, letting go, jumped from them to the ground while the train was moving; but when the infant appellee loosed his hold and jumped, his feet struck a pile of coal which had been placed on the right of way and was for the use of the pumping engine at the tank, and the coal slipped or gave way under his feet, and in this way his right foot went under the cars, and was run over and mashed, so that his foot and about three inches of his leg had to be amputated.

There is no proof that the conductor or any of the other employes of the company saw the infant appellee or other boys when they took hold of the ladders on the sides of the cars or when they were swinging from them, and they were not warned by any of them not to do so, or of the danger of

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doing it, and appellee did not see any of the trainmen at the time; but the step-mother of the infant appellee had told him to keep away from the railroad and from the trains, and his father had told him to keep out of town and away from trains, and to stay at home in the yard, and his unloading freight at the depot and riding on the train to the tank were without their knowledge or consent.

After the accident happened the train was stopped, having crossed the bridge which spanned the creek a short distance from the tank, and the conductor ran back and came up to where the infant appellee was lying.

Over the objections of the counsel for the appellant the court permitted several of the witnesses to testify that when the conductor came up he said that "this is just what I've been expecting for several days, but it is not my fault. If the boys had minded me Willie would not have been hurt."

Counsel for the appellant also objected to all of the testimony of each of several witnesses, which the court permitted to be introduced in behalf of the plaintiff, that showed what the conductor said to the boys on the days previous to the accident with reference to their helping to unload freight at Sebree and riding to the tank.

The proof shows that the infant appellee was a boy of ordinary sprightliness and intelligence. One witness said that, in this regard, "he was just like the common run of boys."

Dr. Parker, the physician and surgeon who attended him and who, with the assistance of Dr. Agnew, amputated his leg, said: "I consider him a sprightly boy—sprightly as other boys of his age and size."

The appellee said to Patrick Williams, one of his witnesses, who carried him away after he was hurt, that "if I

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had minded my father it would not have happened." On cross-examination the appellee said that he "did not know it was dangerous to try to get on or swing from the train."

At the conclusion of the testimony in behalf of the appellee, counsel for the appellant moved the court to exclude from the jury so much of the evidence, already excepted to, as detailed what occurred at the depot at Sebree between the conductor and the infant appellee and other boys with reference to the boys helping to unload the cars and riding to the tank, and also all evidence of the statements of the conductor after the accident, to the effect that he had been expecting, for several days, some such accident to happen; and also moved the court to instruct the jury "to find for the defendant."

It seems that the court did not at the time act upon either of the motions to exclude testimony from the jury, but overruled the motion for a peremptory instruction to which exception was taken at the time, and the first question to be considered arises upon the action of the court in overruling the motion to instruct the jury to find for the appellant.

The motion for the peremptory instruction carried with it an admission of the truth of the material facts brought out in the testimony of the witnesses for the appellee before the jury, and if, by this evidence, it was made to appear that the agents or servants of the appellant, who were in charge of the local freight train which carried the infant appellee to the Deer creek water tank from Sebree on the day he was injured, were guilty of negligence, which was the proximate cause of the injury, then the court did not err in overruling the motion. Otherwise, the instruction ought to have been given, and the court erred in refusing to give it.

The important inquiry, therefore, is whether the facts

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thus in evidence were sufficient to sustain a finding that the agents or servants of the appellant were guilty of negligence, and, if so, whether such negligence was the proximate cause of the injury suffered by the infant appellee.

The facts being admitted by the motion, which is in the nature of a demurrer to the evidence, these inquiries are purely questions of law, which must be decided by the court. After a careful study of the facts under consideration and investigation of the questions involved, in the light of the authorities relied on and quoted in the briefs of counsel on both sides, and other authorities, we have reached the conclusion that the facts do not show that the agents or servants of the appellant were guilty of negligence or of any act or omission of duty toward the infant appellee which can be said in any sense, to have been the proximate cause of the unfortunate accident, the results of which were so painful and are so much to be deplored.

This case must be governed by the ordinary principles of law applicable to cases involving questions of negligence and contributory negligence, except so far as the immature age of the infant appellee may affect the question of contributory negligence on his part. But it is manifest that his immature intelligence and unripe experience, by which he may have been, as alleged, unable to estimate the danger of swinging upon and jumping from a moving train of cars, can not be invoked to fix liability upon the appellant unless the agents or servants of the appellant voluntarily and knowingly exposed him to the dangers which resulted in his injuries, or, knowing that he was in danger, negligently failed to use such means as were in their power to relieve him from the danger and thus avoid the injuries, by reason of which failure the injuries resulted. In this view

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of the case, in order to render the appellant liable, it was necessary to prove that the conductor of the train persuaded or invited the infant appellee to get on the train and ride to the water tank; that the accident that happened there in which he was injured was one that was likely or might reasonably have been expected to happen to him in the ordinary or natural course of events; that the agents or servants of the appellant negligently failed to exercise care for his protection commensurate with the danger to which they had voluntarily exposed him; and that the accident did so happen, resulting in his injuries, without the intervention of any other independent efficient cause. The principles of law upon which liability in such cases is based are well settled by the authorities. (Am. & Eng. Enc. of Law, volume 10, page 674; Wood on Railroads, section 319, pages 1437 to 1439; Paducah & Memphis R. Co., 12 Bush, 41; Bransom's adm'r v. Labrot, &c., 81 Ky., 638; Shields v. L. & N. R. Co., 29 S. W. Rep., 978; Kentucky Hotel Co. v. Camp, 30 S. W. Rep., 1010; Van Natta v. People's Street Railway, Electric Light & Power Co., &c., 34 S. W. Rep., 505; Ky. Central R. Co. v. Gastineau's adm'r, 7 Ky. Law Rep., 3; L. & N. R. Co. v. Hunt, 11 Ky. Law Rep., 825.)

Applying these principles to this case it is clear that the evidence under consideration wholly failed to fix liability on the appellant. It shows that the infant appellee went into the caboose attached to the train of cars voluntarily, knowing that he was acting contrary to the wishes and commands of his parents, without being invited or persuaded so to do by the conductor and without his knowledge. The conductor boarded the train while it was in motion and on the way to the tank; and, assuming that the evidence shows that the appellee was inside the caboose when the conductor entered

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it and that the conductor discovered him as soon as he entered, still it was not the duty of the conductor to stop the train and put the appellee off before reaching the tank, which seems to have been the next stopping place.

When the train reached the tank it stopped to supply the locomotive with water, and the appellee and the other boys got off safely, and the evidence fails to show that the conductor, or any of the trainmen, saw the appellee after reaching the tank until after his foot was mashed. He was not carried to a place where danger was naturally to be apprehended, nor was there any evidence that indicated that the infant appellee was so deficient in intelligence, by reason of immature age, or the want of natural capacity, as to render it necessary that especial care and watchfulness should be exercised to prevent him from exposing himself to danger whenever it might become apparent. If this was necessary then his parents were at fault in failing to enforce obedience to their commands, which were given in order that he might be saved from harm. But as they trusted him to obey, they exhibited their belief that his intelligence was sufficient to enable him to appreciate the necessity of avoiding contact with moving trains. But after all the immediate or proximate cause of the accident was the dislocation of the lumps of coal when his feet struck the pile, by reason of which his foot was turned and projected on the railroad track, where it was crushed by the car wheels.

It can not be said that the placing of the coal there on its right of way by the company for its own necessary use was negligence, or that it was likely to be the occasion of such an accident. And so it is clear that the injuries which the infant appellee suffered were not proximately caused by any

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wrongful or negligent act or omission of the agents or servants of the appellant. We do not mean to be understood as holding that the conductor was guilty of no wrong in inviting and taking on his train of cars young boys without the knowledge or consent of their parents. We only mean to say that whatever wrong he may have committed in this regard respecting other boys on the day of this unfortunate accident he was not on that day, according to the evidence we have been considering, chargeable with wrong respecting the infant appellee. And it follows from what has been said that the court below erred in overruling the motion made by counsel for the appellant for a peremptory instruction, and on that account the judgment in this case must be reversed.

As the case must be tried again, it will be proper to refer to some of the testimony introduced after the motion for a peremptory instruction was overruled, and to pass on exceptions taken during the progress of the trial to the action of the court in admitting and rejecting testimony offered, and in giving and refusing requests for instructions. But we shall do this for the most part in a general way, since the views we have already expressed as to the law applicable to the case are sufficiently explicit. After the motion for a peremptory instruction was overruled by the court a number of witnesses were introduced in behalf of the appellant, and among them the conductor, P. J. Herb, who had been in charge of the local freight trains between Howell, Indiana, and Earlington, Kentucky, for twelve years.

The bill of exceptions contains no evidence introduced by either party that showed that the conductor either invited or induced the infant appellee to ride to the water tank on the day he was injured, or that the conductor was aware

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that he intended to board the train, or when he did so. The conductor testified that he did not know he was on the train until it was within about three-fourths of a mile from the tank, and that when he first discovered him he was on the front end of the caboose, which the conductor himself boarded while the train was in motion; that as soon as he saw him with some other boys there he made them get on the inside of the caboose, and that when the train stopped at the tank he ordered them off, and told them to stay off.

Another witness testified that he saw him and other boys standing on the steps on the front end of the caboose when the train had reached a point which was about half way between Sebree and the tank. Other witnesses, however, testified that they saw him in the caboose at about that time, showing a conflict in the testimony as to the time when he entered the caboose. These facts are important in this connection only as they show the character of the testimony on both sides that was finally submitted to the jury, and upon which the instructions of the court as to the law of the case were given. Over the objections of counsel for the appellant testimony was admitted to prove what was said by the conductor to the boys, including the infant appellee, about helping to take freight from the train and riding to the tank on days previous to the day on which the accident happened. This testimony ought to have been rejected. The case was between the infant appellee and the appellant, and the subject of the investigation was what occurred on the day the injuries were inflicted, and what occurred on previous days had no necessary connection with and was in no sense a part of the transactions of that day. For this reason also the court properly refused to allow proof to be made in behalf of the appellee of what it was

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alleged the conductor and the trainmen said to the boys on occasions before that day about swinging on the ladders attached to the sides of the cars, and telling them to do this in order to learn to be "hoppers' and the like, and that the boys were in the habit of practicing in that way on previous occasions when they rode to the tank. The testimony of what was said by the conductor after the accident as to his having expected such an accident to happen ought not to have been admitted over the objections of counsel for the appellant, because these statements, if made, were not part of the *res gestae*, and although the statement as testified to by some of the witnesses included a protest by the conductor that it was not his fault, and that "if the boys had minded me Willie would not be hurt," still it was to the prejudice of the appellant, and being incompetent testimony it ought not to have been admitted by the court. True, the court excluded it before the case was submitted to the jury, but it was error from the first to admit it against the objection of the appellant. But after the conductor in his testimony denied that he made the statement attributed to him by the witnesses, or any recollection of it, and said that he did not make the statement in the presence of a certain witness, the court permitted that witness to testify over the objection of appellant's counsel that he did make the statement in his presence, but this testimony was admitted, as the court cautioned the jury, only for the purpose of contradicting the conductor. This was likewise error. The testimony of the conductor denying that he made the statement attributed to him was given before the evidence on the subject of his alleged statement was excluded as incompetent, and his denial that he made the statement in the presence of the contradicting witness was brought out on cross-

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examination by counsel for the appellee. After the exclusion of the testimony as incompetent and irrelevant the conditions were the same from a legal standpoint as if it had not been admitted. Under these circumstances it was improper to permit the contradicting witness to testify that he heard the conductor make a statement which in itself was not competent or relevant to the issue on trial. This was an indirect method of getting before the jury the excluded testimony, and no cautionary words addressed by the court to the jury were adequate to remove from their minds the effect of such testimony. It is well settled by the authorities that this method of contradicting a witness is not proper. (Am. & Eng. Enc. of Law, volume 29, page 793; 1 Greenleaf on Evidence, section 462; Crittenden v. Commonwealth, 82 Ky., 164; Commonwealth v. Hourigan, 89 Ky., 311.)

Although some of the instructions given by the court contain a fair statement of the principles of law applicable to the case, yet, taken as a whole, they are not in accord with the views we have expressed. The same may be said of many of the requests that were refused by the court. The question regarding the degree of care that an infant is required to exercise to avoid injury in circumstances of peril becomes material in such cases as bearing on the question of contributory negligence when the evidence tends to establish negligence on the part of the person whom it is sought to make liable for the injury inflicted on the infant. The well-settled rule in such cases is that a child is required to exercise only such a degree of discretion and care as may be reasonably expected of children of his *age and intelligence* in any given circumstances of danger, but the mere immature age of the person injured can not be allowed to

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have the effect "to raise a duty where none otherwise existed." (Nolan v. N. Y. & N. H. R. Co., 25 Am. & Eng. R. cases, 342.)

And none of the authorities make age the only test of the degree of care required of children in such cases. The abstract proposition of law embraced in instruction No. 5 that the infant appellee "was bound to exercise only such care as a boy of like age and discretion would ordinarily exercise under the same or similar circumstances" may be conceded. But as a single proposition, submitted without any connection with the acts of the infant appellee and the circumstances surrounding him, it was misleading and erroneous because of the implied assumption that the appellant was chargeable with negligence, and that a boy of eleven years of age, irrespective of intelligence and natural capacity, could not be held guilty of contributory negligence. (L. & N. R. Co., v. Hunt, 11 Ky. Law Rep., 825; Erwin v. St. Louis. &c., R. Co., 35 Am. & Eng. R. Cases, 390.)

On this line instructions "T" and "U," given at the instance of counsel for the appellant, are unobjectionable; and instruction "J," asked for by them and refused by the court, contains a correct statement of the duty of the conductor after he discovered the infant appellee on the train, and ought to have been given. After discovering him the conductor was under no obligation to stop the train to put him off short of the most convenient and reasonably safe place for that purpose. Instruction "A," asked for by counsel for the appellee, was properly refused by the court, because it was based on the assumption, without any evidence to support it, that the conductor *induced* the infant appellee to ride on the train on the day of the accident, and that he induced or permitted him to swing from it while it was in

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motion, and for the further reason that it virtually made his immature age alone, without regard to his intelligence and natural capacity, the test of the degree of care required of him. (Van Natta v. People's Street Railway, &c., Co., *supra.*)

Instruction "B," asked for by appellee's counsel contained also the same unwarranted assumptions as were contained in instruction "A," and instruction "C" was the same as No. 5, and they were both properly refused by the court. With regard to the instructions given by the court on its own motion, without entering into details, we find that taken together they do not conform to our views as herein expressed of the law applicable to the case upon the evidence as set out in the bill of exceptions, and upon the return of the case the court will, in instructing the jury, conform to the principles of law as we have stated them.

The other case of W. H. Webb, the father of the infant appellee in the first case, as we have stated, rests upon almost precisely the same facts in evidence. The two records presenting nearly the same question, our opinion in the first case settles the questions raised in the other. No testimony was introduced in behalf of the appellant and at the close of the testimony for appellee counsel for appellant moved for a peremptory instruction, which was refused, and which we are of the opinion ought to have been given.

For the reasons given the judgment in each of the cases is reversed and the causes remanded, with directions to set aside the verdict and award a new trial in each case, and for proceedings in each consistent with this opinion.

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CASE 58—PETITION DISMISSED—Mar 29.

City of Owensboro v. Sparks.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. WRIT OF PROHIBITION—WHEN IS AN APPEAL OR ORDINARY REMEDY—CRIMINAL CASES—Under the provisions of section 17 of the Criminal Code authorizing the circuit court by writ of prohibition to "restrain all other courts of inferior jurisdiction in the limits of the county from exceeding their criminal jurisdiction," the circuit court is not authorized to issue a writ prohibiting the police court of a city from proceeding in a prosecution for the violation of an invalid ordinance, the police court having jurisdiction of the offense described in the ordinance and the penalty therefor.
2. PRACTICE—METHOD OF TESTING VALIDITY OF MUNICIPAL ORDINANCE.—In the absence of any express provision by statute for testing the validity of municipal ordinances, the proper method of so doing is by appeal from the judgment of the police court, and the appeal must be prosecuted in the manner provided in other cases.
3. CONSTITUTIONAL LAW—WHEN MUNICIPAL ORDINANCE MAY FIX DIFFERENT PENALTY FROM THAT PROVIDED BY STATUTE.—When a municipal legislative board is authorized by statute to pass an ordinance affixing a penalty for the violation thereof, it may in its discretion fix the penalty at any sum within the jurisdiction of the police court, provided it is not less than the penalty fixed by statute for the same offense. Thus where the penalty fixed by statute for gaming is "not less than twenty dollars nor more than one hundred dollars," and the penalty fixed by the ordinance is "not less than fifty nor more than one hundred dollars," the ordinance is not in conflict with section 168 of the Constitution, which prohibits municipalities from [illegible] by ordinance a penalty "for a violation thereof [illegible] imposed by statute for the same offense."

4. POWER OF MUNICIPALITIES TO CREATE OFFENSES AND FIX PENALTIES BY ORDINANCE. The [illegible] authorizes [illegible] offenses [illegible]

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ance and enforce penalties for violating them, without the statutory authority to do so is plainly conferred upon it.

The provision in a city charter giving the board of council the right to pass ordinances "to prohibit and suppress all gambling houses" does not include the authority to pass an ordinance to punish gaming.

POWERS & ATCHISON AND LaVEGA CLEMENTS FOR APPELLANTS.

1. A municipal corporation may by ordinance impose a greater penalty for an offense within its jurisdiction than is imposed by statute for the same offense. (Sec. 168 Cons.; March v. Commonwealth, 12 B. Mon., page 25.)
2. A municipal corporation may pass an ordinance regulating an offense where there is a statutory penalty already prescribed when conferred by the legislature in specified and defined terms. (Sub-section 12 of section 29 Charters 3d Class Cities; Dillon on Municipal Corporations, sec. 328, 4th edition; Dillon, page 406; Huddleson v. Ruffin, 6 Ohio St., 604; Rogers v. Jones, 1st Wend., N. Y., 237; State v. Welsh, 36 Conn., 215.)
3. A circuit court has no power to issue a writ of prohibition against an inferior court when that inferior court has jurisdiction of the person and subject matter upon which it is acting.

C. S. WALKER FOR APPELLEE.

1. A municipal corporation has no power to inflict a greater penalty for an offense than is inflicted by the Commonwealth.
2. An ordinance must be in perfect subordination to the general laws of the land. (Cooley's Con., Lim., 6th Edition, page 239; Ky. Stats., section 3290, sub-sec. 13 and 16.)
3. A general grant of power does not confer authority upon the corporation to make an ordinance punishing an act which is punishable as a criminal offense by the laws of the State. (1st Dillon on Municipal Corporations, 4th Edition, 368; City of Charleston v. Barber, 54 Iowa, 360; 37 Am. Rep., 209.)

JUGDE LANDES DELIVERED THE OPINION OF THE COURT.

The board of council of the city of Owensboro, which is a city of the third class, passed an ordinance, which was approved June 4, 1894, designated as "Ordinance No. 50," for

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the purpose of punishing gaming in the city, and which is as follows: "That any person or persons who shall, in or on any house-boat, float, tenement, of such house-boat, float or premises, or shall on any of the streets, alleys, sidewalks or public grounds of the city, engage in any game of hazard, at which money or property is bet, won or lost, such person or persons engaged in such game or games shall each be fined for each game thus played not less than fifty nor more than one hundred dollars."

In the following August the appellee, who was charged with violating the said ordinance, was arrested by virtue of a warrant issued by the police judge of the city of Owensboro, and brought before the police court to answer the charge. A demurrer to the warrant was entered by him, which was overruled by the court, and the court having set the case for trial, the appellee brought suit in the Daviess Circuit Court against the city and the judge of the police court, seeking to prohibit them from proceeding against the appellee under the ordinance, with alleged ground that the police court had no jurisdiction to enforce the ordinance, which it was alleged, was passed by the board of council without constitutional or legislative authority, and was, therefore, null and void.

At the commencement of the action the judge of the circuit court issued a temporary order or writ of prohibition, and, on final hearing of the case, adjudging that the ordinance was passed without authority, and that it was invalid, perpetuated the order of prohibition, and adjudged the costs of the action against the appellants, and that judgment is before us on this appeal.

We have not been able to find in the act for the government of cities of the third class or in the Kentucky Statutes

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any special provision for testing the validity of ordinances passed by the municipal legislative board. In the absence of such provisions with reference to ordinances of cities of this class, the only method for testing the validity of any such ordinance is that of appeal from the judgment of the police court enforcing it, and such appeal must be prosecuted in the way provided for prosecuting appeals in other cases.

Section 25 of the Criminal Code authorizes the circuit court of any county by writ of prohibition to "restrain all other courts of inferior jurisdiction in the limits of the county from exceeding their criminal jurisdiction."

But this remedy is not applicable in this case because under the statute (Kentucky Statutes, section 3359) the police court of the city of Owensboro has "concurrent jurisdiction with the justices of the peace of all violations of the laws of the Commonwealth occurring within the corporate limits of the city." And justices of the peace have jurisdiction, exclusive of circuit courts, "in all penal cases, the punishment of which is limited to a fine not exceeding twenty dollars;" and jurisdiction concurrent with circuit courts "of all penal cases, the punishment of which is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, or both." (Kentucky Statutes, section 1093.)

The statute punishing gaming (Kentucky Statutes, section 1977), which is manifestly the same offense which the ordinance in question was intended to apply to, is as follows: "If any person or persons shall engage in any hazard or game on which money or property is bet, won or lost, such person or persons shall be subject to a fine of not less than twenty dollars nor more than one hundred dollars."

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It is clear that the violations of this statute, committed within the limits of the city of Owensboro, are within the jurisdiction of the police court of the city, and that the police court was not exceeding its criminal jurisdiction, conferred by statute, in proceeding with the trial of the offense charged in the warrant against the appellee. It is true that the proceedings were in the name of the city of Owensboro, and, conceding the ordinance to be invalid under the statute denouncing a penalty against the offense charged in the warrant, the proceedings ought to have been in the name of the Commonwealth (Kentucky Statutes, section 3360). But the offense charged was the offense denounced by the statute, of which the police court had jurisdiction, and the prosecution in the name of the city, and not in the name of the Commonwealth, is an error which might have been corrected by appeal. In such cases the remedy by writ of prohibition is not applicable, and for this reason the judgment of the court below must be reversed.

But the important question is presented as to the power of the board of council to pass the ordinance referred to, which ought to be settled. It is contended that the ordinance is invalid because the penalty provided *exceeds the penalty* provided by the statute for the same offense, which it is claimed is opposed to the provisions of section 168 of the Constitution. That section prohibits municipal corporations from fixing by ordinance a penalty "for a violation thereof at *less* than that imposed by statute for the same offense."

In this case the penalty fixed by statute for gaming is "not less than *twenty* dollars nor more than one hundred dollars;" and the penalty fixed by the ordinance is "not less than *fifty* nor more than one hundred dollars." This is not

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prohibited by the Constitution, and under its provisions, where a municipal legislative board is authorized by statute to pass an ordinance affixing a penalty to the violation thereof, it may, in its discretion, fix the penalty at any sum within the jurisdiction of the police court, provided it is not less than the penalty provided by statute for the same offense (Kentucky Statutes, section 3364 and section 3294, chapter 22). This ground of objection, therefore, can not be entertained.

Another ground of objection is that the municipal legislative board has no statutory authority to pass the ordinance, and this objection, we think, is well taken.

By the act for the government of cities of the third class we do not find that the boards of council of such cities have the authority to pass ordinances punishing gaming, which is fully covered by the statute quoted. They have the authority "to prohibit and suppress all *gambling houses*" (Kentucky Statutes, section 3290, chapter 13). This clause also authorizes the board of council of such cities "to prohibit and suppress" bawdy houses.

Under this provision we held in recent case of City of Owensboro v. Simms, 17 Ky. Law Rep., 1393, that the board of council of the city of Owensboro was empowered to pass the ordinance contested in that case, the object of which was to suppress bawdy houses; but in this case the ordinance is not to prohibit and suppress "gambling houses," but to punish gaming, which is not embraced in the authority conferred by the clause referred to, nor by any other provision of the act that we have been able to find or that has been referred to by counsel. Without statutory authority plainly conferred the board of council of cities of the third

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class can not create offenses by ordinance, and enforce penalties for violating them.

For the reasons indicated, however, the judgment is reversed and cause remanded with directions to dismiss the petition.

CASE 59—PETITION EQUITY—MAY 2.

99 357
113 617

99 357
119 802

99 357
129 95

Pearce v. Mason County, et al.

APPEAL FROM MASON CIRCUIT COURT.

1. REPEAL OF SPECIAL ACT BY GENERAL ONE—CONSTITUTIONAL POLICY—CONSTRUCTION.—While it is probably the policy of our new Constitution to have general laws substituted for local ones, if an inspection of the general act shows an utter absence of legislative intent to affect the local act, by reason of not embracing its leading and essential features, the courts will not distort the legislative meaning in furtherance of such supposed policy.

   In view of that policy the courts may declare the general act to be in substitution of the local ones, when they are satisfied there is a substantial identity of subject matter and purpose in the general and special acts. But in the end the subject of the inquiry is the legislative intent and purpose in passing the general law.

2. CONSTITUTIONAL CONSTRUCTION.—Sub-sections 15 and 16 of section 59 of our Constitution, prohibiting the passage of local or special legislation regulating or authorizing the levy and collection of taxes, or authorizing the opening, altering, maintaining or vacating roads, highways, streets, alleys, etc., look altogether to future legislation, and manifestly do not affect, directly or indirectly, the laws already in force; and the existing special legislation on the subjects named in the various sub-sections of section 59, with respect to which special acts are now

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prohibited, does not stand repealed by the mere force of such prohibition.

3. FISCAL COURT—POWER TO CARRY OUT GRANT OF AUTHORITY TO OLD COURT OF CLAIMS.—The fiscal court of a county has the power to carry out the provisions of a special act passed prior to the adoption of our present Constitution, which act granted the then existing court of levy and claims certain powers with reference to carrying into effect its provisions.

WILLIAM LINDSAY FOR APPELLANT.

1. The repeal of the 8th section of the act of 1886 withdrew the authority conferred upon the county court of Mason county to submit the proposition whether or not the people should be taxed to acquire control and to render free the turnpike roads of that county, or any portion of them, and destroyed the vitality of the whole act. (Weller v. Com., 14 Bush, 218.)
2. The act of 1886 was a local statute and purported to authorize the levy, assessment and collection of taxes, and also the opening and maintenance of roads and highways, and is therefore in conflict with sub-sections 15 and 16 of section 59 of the Constitution of Kentucky, and sections 171 and 181 of same.
3. Admitting that the act of 1886 is not so far inconsistent with the present constitution as that it ceased to be operative upon the adoption of that instrument, when the provisions of sections 171 and 181 of that instrument were put into effect by appropriate legislation, the local act certainly then became inoperative.
4. The provision in the act of October 17, 1892, creating fiscal courts in the counties of this State, that said fiscal courts should have jurisdiction over such matters relating to the levying of taxes as is by special act conferred on the county court or the court of levy and claims, is not such a delegation of power as was intended to keep alive local acts under which no action had been taken and under which at the time no taxes could be lawfully assessed, levied or collected.

A. M. J. COCHRAN ON SAME SIDE.

1. A law passed before the fiscal court of Mason county came into existence could not possibly confer upon it the jurisdiction or power to do anything. Its jurisdiction and power must be gathered from the instrument creating it or constitutional legislation subsequently enacted.
2. The act of 1892 creating fiscal courts, is unconstitutional in so far

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as it attempts to confer upon the fiscal court of Mason county jurisdiction and power to act in lieu of the county court of levy and claims, that being special legislation which is prohibited by section 59 of the constitution.

3. The levying, assessment, and collection of taxes under the special act of 1886 is directly in conflict with section 171 of the Constitution which provides that all taxes shall be levied and collected by general laws; and the provisions of that section do not require legislation to put them into force.

4. General legislation has been had putting into force the provisions of sections 59, 171, and 181 of the Constitution, as to the levying and collecting of taxes, and the assessment, levy and collection could only be made under the general law.

L. W. ROBERTSON ON SAME SIDE.

1. Sub-section 16 of section 59 of the Constitution of Kentucky provides that authority for "opening and maintaining roads, high, ways, etc.," must be given by general laws, and all local and special legislation on that subject is inconsistent with the Constitution.

2. When the provisions of the Constitution are put into operation by a general law, however meager in its terms, or different from, and less comprehensive than the local law, all such special laws are thereby repealed.

3. If a general law covers the same general subject as the local act, it matters not that the local law provides more ways or modes or ampler authority for accomplishing the purposes of the law, the general law as provided by the Constitution must prevail and stand as the whole law of the case and all the law on that subject. (Piper v. Gunther, 95 Ky., 115.)

W. H. WADSWORTH ON SAME SIDE.

1. The vitality of the act of 1886 was made to depend upon section 8 thereof providing for vote of the people before its provisions should be effective, and the repeal of that section by the act of 1890 took from the law the power and force that made it an enactment, and operated as a repeal of the whole act. (Commonwealth v. Weller, 14 Bush, 218.)

2. The act of 1886 was repealed by section 171 of the Constitution, and the general legislation subsequent thereto on the subject of turnpikes.

3. The Legislature could not authorize the fiscal court of Mason

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county to carry out the provisions of the special act of 1886, that court being a creature of the Constitution and subsequent legislation, and not a continuation of any former court; therefore such authority could not be conferred upon said court by reference to the special acts which would be a violation of section 51 of the Constitution; and if it could be conferred in that way, it would be in violation of sub-sections 15 and 16 of section 59 of the Constitution.

GARRETT S. WALL FOR APPELLEE.

1. The appellant claims that the amendment of the local act of 1886 was repealed by the act of 1890, and if it does not, then the act of 1894 repeals said local act. (Acts 1885-86, Vol. 2, page 642; Acts 1889-90, Vol. 3, page 124; Acts 1894, secs. 4737 to 4741, Ky. Statutes.) In answer to this appellee states that the appellant virtually abandons first claim, in that he cites no authority in support of the position that, the "repeal of one section, repeals the entire act." (Commonwealth v. Weller, 14 Bush, page 218.) As to the act of 1894 appellee states that the appellant's position in reference to said act, has been answered so as to leave no room for argument, by this court in its ruling in the case of O'Mahoney v. Bullock, Vol. 31, South Western Law Reporter, page 878.

E. L. WORTHINGTON ON SAME SIDE.

1. The act of 1886 was a perfect law as soon as it was passed, and by its terms it took effect "from and after its passage." Section 8 thereof provided that the law should not take effect until submitted to a vote of the people of the county, and upon repeal of that section all other parts of the act remained in force just as they would if section 8 had never been incorporated therein, or had been stricken out by the legislature before the bill was first passed. (Commonwealth v. Weller, 14 Bush, 222.)
2. A prior local act which provides for levying a tax for free turnpikes is not repealed by sections 59 and 171 of the Constitution, and the general turnpike laws since passed; nor is such local act in conflict with section 181, all three of said sections being prospective and not retrospective in their action. (O'Mahoney v. Bullock, 17 Ky. Law Rep., 523; Long v. City of Louisville, 17 Ky. Law Rep., 253.)
3. All local and special laws passed prior to the Constitution are not inconsistent with section 59 thereof. (Piper v. Gunther, 95 Ky., 115.)

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4. It was not intended by section 59 of the Constitution that all local and special acts theretofore passed should be repealed; nor does it impose any duty on future legislatures to repeal them. The rules for determining whether a local law has been repealed by a subsequent general law have not in any wise been changed by the Constitution. (Evans v. Phillipi, 117 Pa. St., 226; O'Mahoney v. Bullock, 17 Ky. Law Rep.)
5. It is the exclusive province of the Legislature to determine whether a general law can be made applicable, and not a province of the courts. (State v. Hitchcock, 1 Kan., 178; 81 Amer. Dec., 503; State v. County Court of Boone Co., 50 Mo., 317; 11 Amer. Rep., 415; State v. Tucker, 46 Ind., 355; Sutherland on Statutory Construction, sec. 117; Cooley's Con. Lim., 154.)

L. W. GALBRAITH ON SAME SIDE.

1. If the Act of 1886 is now in effect the appellant is without ground to reverse the judgment rendered by the Mason Circuit Court, for the reason that there is no claim that the acts of the fiscal court of Mason county and those from the doing of which, the appellant seeks to restrain the county officers, are not fully warranted by the provisions of said law.
2. The act of March 3, 1894, does not repeal the act of 1886 for the reason that by the reading of said act of 1894, there is no means of making the law, empowering fiscal courts to subscribe stock in turnpike roads, operative without its adoption by a majority vote in the respective counties. (Acts 1894, page 63, Ky. St., secs. 4737-4741.) No such vote having been held in Mason county, appellee raises the objection that it can not affect the repeal of a local law, otherwise in full force. (Sutherland on Statutory Construction, sec. 75; Spaldin v. Alford, 1st Pick. (Mass.), 33; Commonwealth v. Weller, 14 Bush, page 218; State v. Township Comm., 3 Centr. Rep., 351.) If this clause *does* show legislative intent to repeal any statute, the presumption is, that it was a general law to which it was directed and not a special. (Endlich on Interpretation of Statutes, sec. 233; Sutherland on Statutory Construction, sec. 147.) Implied repeals only grow out of such repugnance as makes it impossible for the two statutes to stand together. (Sutherland on Statutory Construction, sec. 138; U. S. v. Claflin, 97 U. S., 546, Amer. & Eng. Enc. of Law, Vol. 23-483; Beatty v. Commonwealth, 91 Ky., 318; Seefried v. Commonwealth, 101, Pa. St., 200; Commonwealth v. Weller, 14 Bush, 224.) When one statute is local and the other general, they will both be upheld and construed as forming one consis-

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tent whole.. (Commonwealth v. Cain, 14 Bush, 533; Adams Express Co. v. City of Lexington, 83 Ky., 657; Adams Express Co. v. City of Owensbort, 85 Ky., 265; Commonwealth v. Mason, 82 Ky., 632; Endlich on Interpretation of Statutes, 216-223; Sutherland on Construction of Statutes, 157; Cooley on Taxation, 294.)

2. The Legislature never had any intention of repealing the act of 1886 by the statute of 1894. There is neither identity of subject matter or purpose in the two statutes.
4. The prohibitions of the Constitution are prospective only in respect to special legislation and do not invalidate such local statutes as were in conformity with the Constitution when enacted and not otherwise inconsistent with the present Constitution. (Evans v. Phillipi, Pa., 9 Central Reports, 691.)
5. The statute of 1894 has no bearing on this case and cites the rulings of the Supreme Court in defense of the statement. (Piper v. Gunther, 95 Ky., 119; O'Mahoney v. Bullock, 31 South Western Reports, 878.)

W. H. HOLT ON SAME SIDE.

1. The act of 1886 was a perfect law immediately upon its enactment—its going into effect was to be upon condition of being first submitted to a vote of the people; if before its submission the Legislature repealed the clause containing that provision, it merely meant it should be operative without the submission.
2. Where in an act under the former Constitution powers were granted to the court of levy and claims of a county, those powers may be exercised by the fiscal court provided for in the new Constitution. (O'Mahoney v. Bullock, 17 Ky. Law Rep.)
3. Section 59 of the Constitution refers only to future legislation with reference to special acts, and not to legislation previously enacted. (O'Mahoney v. Bullock, 17 Ky. Law Rep.)
4. A general law or general words in a statute are not to be construed as repealing by implication a particular statute. (Sutherland on Statutory Construction, sec. 157; Cooley on Taxation, pp. 294-5.)

GEO. W. ADAIR, C. D. NEWELL AND MILTON JOHNSON ON SAME SIDE.

No brief in the record.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

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The principal question involved here is whether the local act of March, 1886, entitled "An act to provide free turnpike roads in Mason county," is yet in force.

The learned counsel for appellant rest their contention that it is no longer in force, not upon any provision of the Constitution expressly repealing it, or upon legislation subsequently had, if its effect be determined by the ordinary rules of statutory repeal, but the contention is that the policy of the Constitution, which demands the substitution of general laws for all local ones, is inconsistent with the act, and, therefore, when a general law on the subject of free turnpikes, such as may be found in the fragmentary and incomplete legislative enactments on that subject since the adoption of the Constitution, was adopted, it must be taken as a full and complete expression of legislative will on that behalf, and if even important omissions are observable in the general act, it is yet the whole law on the subject, so far as intended to be kept alive by the Legislature.

This principle may be admitted in a limited sense, but we are not prepared to accept the conclusions reached by counsel in the application of the principle. Surely if an inspection of the alleged general act shows an utter absence of legislative intent to affect the local act, by reason of not embracing its leading and essential features, we are not required to distort the legislative meaning in furtherance merely of a supposed constitutional policy.

While in view of this policy the courts may declare the general act to be in substitution of local ones, without it appearing that a repeal would be effected by the ordinary rules of statutory construction, where one statute can be held to repeal another, yet certainly the courts must, in the nature of things, before so declaring, be satisfied that there is sub-

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stantial identity of subject-matter and purpose in the general and in the special acts, otherwise the conclusion must be reached that if the Legislature fails to enact a general law at all on a given subject, affected by local acts, it is the legislative intent that there shall be no law on that subject, and local acts with respect thereto must stand repealed. No such policy is apparent in the Constitution.

The intent and purpose of the Legislature, therefore, in adopting a general law is the proper subject of inquiry, and in this case we are satisfied, as we were in the O'Mahoney-Bullock case, 17 Ky. Law Rep., 523, that it was no part of the legislative purpose to enact a general law in lieu of all local ones on the subject here involved.

It is contended further, that the provisions of subsections 15 and 16 of section 59 of the Constitution, and of sections 171 and 181 of the same instrument, when taken together effect a repeal of the local act, not perhaps in themselves, but when quickened or made effective by the legislation subsequently had.

This argument is of kin to the former one, and at last depends for its efficacy upon the nature, character, and especially the comprehensiveness of the subsequent legislation—elements, as we have seen, which are wholly wanting in the subsequent acts referred to.

Section 59 prohibits the passage of local or special legislation regulating or authorizing the levy or collection of taxes (subsection 15), or authorizing the opening, altering, maintaining or vacating roads, highways, streets, alleys, etc. (subsection 16.)

These provisions look altogether to future legislation, and manifestly do not affect, directly or indirectly, the laws already in force. The existing special legislation on the

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subjects named in the various subsections of section 59, with respect to which special acts are now prohibited, does not stand repealed by the mere force of such prohibition. The General Assembly may repeal any of these special acts by a special act for that purpose, or by substitution of comprehensive general laws, or, with respect to such of them as may be inconsistent with those provisions of the Constitution which require legislation to enforce them, by the enactment of laws effectuating such constitutional provisions. Such special acts as are inconsistent with those provisions of the Constitution which do not require legislation to enforce them stand repealed.

So where, by a former special law, a city was authorized to incur an indebtedness beyond the constitutional limit, no question of contract right intervening, it has been held that the power could not be exercised under the special act (Beard, &c., v. City of Hopkinsville, 95 Ky., 239); and where the organic law requires the jurisdiction of justices' courts to be equal and uniform throughout the State, it has been held that the special acts conferring jurisdiction were inconsistent with the constitutional provision, and stood repealed when the general law fixing the jurisdiction was enacted. (McTigue v. Commonwealth, 17 Ky. Law Rep., 1418); and, moreover, this would afford an illustration of a repeal after six years had there been no general law passed.

The act in question here does not stand in any of these attitudes. Manifestly the provision requiring that "all taxes shall be levied and collected by general laws" looks to the future, as held in Long v. City of Louisville, 17 Ky. Law Rep., 253, and can not be held to affect the powers conferred in the pre-existing law. It seems to us that the schedule of the Constitution conclusively settles this question of repeal.

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In order that no inconvenience might arise by reason of the alterations and amendments of the law by that instrument, it was deemed proper to provide that the Constitution left in force all laws of the Commonwealth with which it was not inconsistent. This provision, instead of emphasizing the alleged policy of hostility to existing special legislation, expressly continued it in force unless inconsistent with the Constitution; and when it is admitted or becomes manifest that a local or special act is not inconsistent with the Constitution, and has not been repealed by a general law, the question is settled and the law stands.

The positive mandate is against local and special legislation in the future, and, even if we concede that the Constitution breathes a spirit of hostility to past legislation of that class, it is expressly continued in force until repealed in the manner we have heretofore pointed out; nor does the fiscal court lack the power to carry out the provisions of the act in lieu of the old court of claims and levy. The provisions of the law creating such a court, and conferring authority on it, seem ample. (Section 144, Constitution; section 1840, Kentucky Statutes.)

We do not regard the amendment of 1890, which repealed the section requiring a vote to put the law in force, as destroying the whole act. It was not so intended. The principal questions involved have been determined in O'Mahoney v. Bullock, heretofore cited.

Judgment affirmed.

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CASE 60—PETITION EQUITY—MAY 30.

99 367
105 540

Morton v. Woodford, et al.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. ESTABLISHING TOWNS—ACTS GIVING THAT POWER TO THE COURTS CONSTITUTIONAL.—The Kentucky Statute conferring upon circuit courts the right to establish towns in this State under certain conditions, is constitutional.
2. APPEALS—POWER OF THE LEGISLATURE TO RESTRICT.—The legislature has the power to designate in what class of cases appeals may be taken from the lower courts, and it is expressly provided in the statute under consideration that no appeal shall be allowed from the judgment of the circuit court.

J. A. DEAN FOR APPELLANT.

1. The petition of the appellee was not good because it showed that the territory sought to be incorporated is greater in extent than is permitted by the statute. The wording of the statute referring to the limits of the boundary of a town to be incorporated is *complete* and without *ambiguity*, therefore no more can be necessary than to expound said wording in the natural and ordinary sense. (Sutherland on Statutory Construction, section 247.)
2. The Legislature in framing a general law under which municipal governments might be called into existence arbitrarily, fixed a limit below which the territory should not go in point of density of population.
3. The petition did not state facts showing that the petitioners were persons entitled to vote.
4. The allegations of the petition which are denied in the answer are not of such facts as are presumptively within the knowledge of the defendant and the court erred in sustaining the demurrer to the answer. (Civil Code, sub-sec. 7 of sec. 113; Wing v. Dugan, 8 Bush, 583; Greer v. Covington, 83 Ky., 410.)
5. The creation of a corporation is an exercise of the sovereign power and essentially legislative in its nature and there is no authority in the Constitution for the delegation of such legislative power

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to the courts, therefore the assumption of such power by the courts, without express constitutional provision permitting such legislation, is unconstitutional. (Territory v. Stewart, 29 Amer. & Eng. Corp. Cases, 22; People v. Nevada, 6 Cal., 143; People v. Bennett, 29 Mich., 451, 17 Am. Rep., 107; 15 Amer. & Eng. Enc. of Law, page 961 and note; Cooley on Constitutional Limitation (4th ed.), 145, 146; in re Osborne, 101 Pa. St., 284.)

6. If either the area allowed by the statute was exceeded, or there was not the requisite number of voters that signed the petition, then the jurisdiction of the court did not attach and therefore any judgment rendered by said court was void. (13 Atlantic Reporter, 224 (cited in note 1), page 962, 15 Amer. & Eng. Enc. of Law.)
7. The statute should *not* be so construed as to show appellant has no right to appeal. (Sutherland on Statutory Construction, secs. 366, 369.)

ELI. H. BROWN FOR APPELLEES.

1. The Legislature is given the power by our present Constitution to change or modify the right of appeal, and the same power was given by the Constitution of 1850; and under this power the Legislature for over forty years restricted the right of appeal to this court in a large class of actions and denied the right of appeal in some, and regulated the right generally. (Constitution of Ky., Secs. 110, 125, 126 and 127; Constitution of 1850, Art. 4, sec. 18.)
2. The right of appeal in this State is purely statutory, our statutes having repealed the common law as to writs of error, and we must therefore look alone to the statutes for the jurisdiction of the Court of Appeals, and the manner of having it exercised over actions of which the Legislature has given it the power of review. (Amer Dic. of Law, 580.)
3. The exercise of the right by the courts to establish towns and refuse the petition to establish them, is not an attempt upon the part of the judicial department to usurp an exclusively legislative function. (Fletcher v. Peck, 6 Cranch, 87; Cooley's Con. Lim., 5 ed., 108; Works on Courts and Their Jurisdiction, sec. 29.)
4. Statutes similar to the one under consideration have been upheld in a great number of States. (See 15 Amer. & Eng. Enc. of Law, pp. 958 and 959, and authorities there cited.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

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This appeal is prosecuted by the appellant from a judgment of the Daviess Circuit Court, establishing the town of Kenwood.

The only questions which we deem it necessary to determine are: First, whether the circuit court can legally establish a town; second, has this court jurisdiction of an appeal from such a judgment of the circuit court?

Article 8, chapter 89 of the Kentucky Statutes, confers upon circuit courts the power under certain conditions to establish towns, and provides that no appeal shall lie from the judgment. We think the power so conferred on the circuit courts is constitutional.

Section 126 of the Constitution provides that the jurisdiction of circuit courts should remain as then established by law, giving the Legislature power to change the same. The Constitution also prohibits local legislation, hence some department of government must of necessity be invested with power and authority to establish towns, and it seems to us that the circuit courts are proper tribunals to be invested with such power.

The act in question is not, in our judgment, at all in conflict with section 28 of the Constitution. The power conferred is not legislative. This court has appellate jurisdiction only, and section 110 of the Constitution provides that such jurisdiction shall be under such rules and regulations, not repugnant to the Constitution, as may from time to time be prescribed by law.

The act of the Legislature of the 10th of June, 1893, provided that no appeal to this court should be allowed from judgments in many cases enumerated in the act, and then provided that in all other civil cases appeals might be taken, but after the passage of this act the act of July 3, 1893, con-

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ferring the jurisdiction on circuit courts to establish towns, was passed and appeals from judgments in such cases disallowed.

It has always been recognized as within the power of the Legislature to determine from what judgment appeals might be taken.

For the reasons indicated we are of opinion that this court has no jurisdiction of this appeal, and the same is dismissed.

CASE 61—INDICTMENT— MAY 8.

Warren v. Commonwealth.

99 370
110 112
111 541

APPEAL FROM HARDIN CIRCUIT COURT.

1. HOMICIDE—EVIDENCE—CONDUCT OF PROSECUTING ATTORNEY.—On the trial of an indictment for homicide, evidence introduced by the Commonwealth that the deceased left a wife and four children and that the wife had been sick ever since her husband's death was not material and did not operate to the prejudice of defendant's substantial rights; nor did the customary speech of the prosecutor in such cases with regard to the reputation of the State for crimes of violence and the disgrace a failure to convict would, as he claimed, bring upon the county, have the effect to inflame the minds of the jury, it appearing that the penalty imposed was the lowest permitted for voluntary manslaughter.
2. EVIDENCE—WHEN DEFENDANT IS INTRODUCED AS WITNESS.—When a defendant puts himself on the stand as a witness, he thereby submits himself to such cross-examination as any other witness may be subjected to. (Burdette v. Commonwealth, 93 Ky., 77.)
3. DISCREDITING WITNESS ON CROSS-EXAMINATION.—While counsel should not be given unrestricted liberty in cross-examination of a witness with reference to his past life, history and habits, yet he may be asked such questions as tend to shake his credit by injuring his character, and he may be cross-examined as to specific

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facts, tending to disgrace or degrade him, although such facts are irrelevant and collateral to the main issue; but the extent to which such cross-examination may be carried is within the discretion of the court.

4. EVIDENCE—GENERAL MORAL CHARACTER.—Evidence introduced by the defense that a prosecuting witness was a "tough negro," would undoubtedly be understood by jurors generally as putting in issue his general moral character, and would give the prosecution the right to introduce evidence to sustain the same.

5. HOMICIDE—INVOLUNTARY MANSLAUGHTER—INSTRUCTIONS.—An instruction as to involuntary manslaughter was properly refused in this case where the deceased was accidentally killed while the defendant was either defending himself against another or attempting to kill such other. The distinction between such a case, and one in which there is an unintentional discharge of a pistol lies in the intent.

HOBSON & O'MEARA FOR APPELLANT.

1. The lower court erred in overruling an objection to testimony introduced by the Commonwealth to the effect that the deceased's wife and children were left in a destitute condition, as it was incompetent and introduced for the purpose of prejudicing the jury. (2 Bishop Crim. Pro., sec. 263.)

2. In a criminal case the State can not ask any question on a pretext of cross-examination of the defendant, that could not properly be asked of any other witness in the case, and the lower court erred in overruling the appellant's objection to such testimony. (1 Wharton on Evidence, sec. 541; 1 Wharton on Evidence, 545, 551, 562.) The cross-examination of a witness must be confined to matters stated in his direct examination, unless to discredit the witness by evidence of prior contradictory statements. (Wills v. Russell, 100 U. S., 621; 1 Greenleaf on Evidence, secs. 454, 455, 459, 461.)

3. The fact that a man has been put in jail to *get* sober does not affect his credibility *when* sober. The lower court erred in overruling objection to testimony, showing that witness had been jailed for drunkenness.

4. Until the general moral character of the State's witness had been impeached, the State had no right to introduce proof to sustain it. (Vance v. Vance, 1 Met., 583; Atwood v. Dearborn, 79 Am. Dec., 755.) The character of a witness can not be sustained by the personal knowledge of the sustaining witness. Burdette v. Commonwealth, 93 Ky., 76, in so far as it applies to this case, should be overruled.

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5. There is no distinction in principle between a pistol being unintentionally discharged and the bullet being fired from a pistol and striking another object, then glancing where it could not reasonably be anticipated to strike, and according to this theory the court should have given instruction as to involuntary manslaughter. (Trimble v. Commonwealth, 78 Ky., 176.)
6. The appellant had a right to act on reasonable appearances at the time and was not required to wait until the negro made an actual attempt to kill him. There are cases in shooting affrays like this where the evidence may show a state of case in which both parties would be justifiable on the grounds of self-defense. (Doolan v. Commonwealth, 95 Ky., 29.) The appellant thought that the negro fired the first shot, and even though he did not think so he could not be expected to await his assailant's fire, and the court erred in instructing the jury to find against him unless they believed he was attacked first. Instructions substantially the same as this have been condemned. (Haney v. Commonwealth, 5 Ky. L. Rep., 203; Amos v. Commonwealth, 16 Ky. L. Rep., 358; Cockrill v. Commonwealth, 95 Ky., 22.)

W. S. TAYLOR FOR APPELLEE.

1. A witness may be examined for purposes of impairing his credibility as to specific facts tending to disgrace or degrade him, although such facts are irrelevant and collateral to the main issue. (Burdette v. Commonwealth, 93 Ky., p. 78.)
2. The appellant was evidently trying to shoot one man and killed another and the facts did not authorize an instruction as to involuntary manslaughter.

JUDGE DU RELLE DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a judgment of conviction for voluntary manslaughter.

The first ground urged for reversal is that the Commonwealth, against objection by the defense, was allowed to prove that the deceased left a wife and four children, and his wife had been sick ever since her husband's death, and that the Commonwealth's attorney was permitted in his argument to the jury to comment upon the fact that the

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defense had objected to an explanation of the absence of the widow from the trial.

The evidence does not seem to be particularly material, but in our judgment did not operate to the prejudice of the substantial rights of the defendant. Neither this evidence nor the speech of the prosecutor to the effect, customary in such cases, in regard to the reputation of this State for crimes of violence and the disgrace which it was claimed would come upon the county in the event of a failure to convict the defendant, appear to have had the effect to inflame the minds of the jury, for the penalty imposed was the lowest permitted for voluntary manslaughter.

The next objection is that upon cross-examination of the defendant, who was sworn as a witness in his own behalf, the prosecution, against objection, was permitted to ask questions, the effect of which was to discredit him as a witness before the jury. These questions were as to whether he had any employment, how long since he had had work, and whether his crippled foot had prevented his working four or five years before it became injured. Undoubtedly these questions were asked for the purpose of discrediting him as a witness by showing from his answers that he was a trifling person, with no fixed employment. The questions were entirely irrelevant to the commission or circumstances of the homicide, and if he had denied the facts suggested by them he could not have been contradicted. When a defendant puts himself on the stand as a witness he thereby submits himself to such cross-examination as any other witness may be subjected to. (Burdette v. Commonwealth, 93 Ky., 77.)

A witness may, on cross-examination, be asked any questions which tend "to shake his credit by injuring his charac-

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ter," and may be compelled to answer such questions, though it is said that "the court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered, when the truth of the matter suggested would not, in the opinion of the court affect the credibility of the witness as to the matter to which he is required to testify." (Am. and Eng. Ency. Law, section 7, page 109, quoting from Stephen's Digest of the Law of Evidence.) And it is said in Taylor on Evidence, section 1462, that "it seems to be generally conceded that, where the answer which the witness may give will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may be compelled to reply." (See also Greenleaf on Evidence, section 456.)

We are not to be understood as holding that counsel are to be allowed unrestricted liberty in cross-examination of this character, or that a witness is to be compelled to submit to an exploration of the most remote passages of his past life by means of fishing questions in regard to scandalous or discreditable acts. As said in Wharton on Evidence, "every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers." And in Taylor on Evidence, section 1460-61, it is said: "No doubt cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed, for the interests of justice can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So

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questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for, if the injury relates to transactions camparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him."

And so this court in the case of Burdette v. Commonwealth before referred to, citing with approval Kansas v. Pfefferle, 30 Kansas, 90, arrived at the conclusion that according to the tendency of modern authorities, as well as upon principle, a witness may, for the purpose of impairing his credibility, " be cross-examined as to specific facts tending to disgrace or degrade him. although such facts are irrelevant and collateral to the main issue, and we see no good reason whatever why such test may not, in a proper and pertinent manner, *and under control of the court*, be applied." In our opinion the questions complained of do not call for revision by this court of the exercise of discretion by the trial judge. What has been said upon this objection applies also to the objection made to the questions asked of another witness, namely, how often he had been in jail, and if he didn't make it a business to lie around Elizabethtown drunk during elections, and bleeding candidates. The answer given that he had been in jail something less than a thousand times, and that he had been in town and gone home without getting full when he had money to get whisky with, would indicate that the question was a proper one on the cross-examination of that witness.

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It is further objected that the State was permitted to introduce a witness to sustain the moral character of the negro, Franklin. The objection is based on the ground that the defense had not attempted to impeach his general moral character, "but only his character for peace and quiet, and being a tough negro." In response to this it may be said that the statement of the witness that Franklin was a tough negro would undoubtedly be understood by jurors generally as putting in issue his general moral character.

This brings us to the errors alleged in the instructions. The defense asked an instruction as to involuntary manslaughter upon the theory that there is no distinction in principle between the unintentional discharge of a pistol and a bullet from a pistol glancing where it could not reasonably be anticipated to strike. The distinction lies in the intent. There is no evidence in this case of a shooting without the intent to kill. (Connors v. Commonwealth, 13 Bush, 718.)

The defendant either did not kill Vittitoe at all, or killed him while defending himself against Franklin, or killed him while attempting to kill Franklin. There was nothing in the case to justify an instruction upon involuntary manslaughter. (Trimble v. Commonwealth, 78 Ky., 178.)

The defense also complains of the refusal of the court to give the following instruction:

"*B*. If at the time defendant shot and killed Vittitoe, if he did so shoot and kill him, he believed and had reasonable grounds to believe that his life was in imminent danger, or that he was in imminent danger of receiving great bodily harm at the hands of Sheed Franklin, and that he had no other apparently safe means of escape except by shooting

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him, and in attempting to shoot said Franklin he accidentally shot said Vittitoe, then the law is for the defendant and the jury should so find."

In lieu of the instruction asked the court gave instructions 4 and 5, which seem to us to fully cover the law of self defense as applicable to the evidence adduced in that behalf in this case.

Judgment affirmed.

CASE 62—PETITION EQUITY—MAY 19.

Miller v. Cavanaugh.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. INTEREST—WHEN TO BE COMPUTED FROM WHEN TIME NOT SPECIFIED.—A note payable in two years after date "with interest at the rate of six per cent. per annum, from ———— until paid," bears interest from date, and not merely from date of maturity.
2. PLEADING—MOTION TO APPOINT RECEIVER—PRACTICE—WAIVER.—Where a plaintiff, without notice, enters a motion to appoint a receiver to take charge of the property in suit, and files an amended petition, and the defendant answers the amended petition, and resists the motion to appoint a receiver, any irregularity in filing the amended pleading or entering the motion was waived by the defendant.

L. J. MOORE FOR APPELLANT.

1. Where a petition states that the plaintiff executed and delivered a note to himself, the pleading is faulty and a demurrer to same should be sustained. When a note is blank as to when it shall bear interest, then interest can not be counted until maturity of the note.
2. The lower court erred in placing the motion on the Motion Docket,

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and the action on the Trial Docket, both to be tried on the same day. The motion was contrary to the provisions of Kentucky Statutes, sec. 13. No action has a right to be on more than one docket at any one time.

3. The lower court erred in overruling demurrer to a motion filed prematurely without any notice to defendant, and at a time when no pleading or affidavit had been filed to support it.
4. A statement in the amended petition that the defendant was insolvent is a conclusion of law and is not good pleading.
5. The appellant suffered hardship at the hands of the lower court in being compelled to file affidavits first to support his grounds of defense, thus allowing the plaintiff, without presenting any cause of action, to see said affidavits and then present his ground in support of his motion.
6. Sections 298, 299 of the Civil Code do not in any way apply to this case, for it has been decided that courts of equity are always reluctant to interfere with the possession of real estate by the appointment of a receiver, and they never do so unless the remedy at law is incomplete. (Collins v. Richard, 14 Bush, p. 621.)

BRONSTON & ALLEN FOR APPELLEES.

1. The affidavits can not be considered because no bill of exceptions was ever prepared or made a part of the record.
2. The lower court did not err in appointing a receiver where the vendee was insolvent and failed to keep the property in repair and insured, and when the property was depreciating in value, even though part of the purchase price was not due.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

This action is on a note executed by Miller to Cavanaugh for $500, payable two years after date, "with interest at the rate of 6 per cent. per annum from —— until paid."

The judgment gave interest from the date of the note. It is insisted that it was error for the court to give interest from the date of the note upon the principle that when an obligation is silent as to when interest is to run the law implies that it bears interest only from the time it falls due.

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We concede that to be the correct rule when a case arises for its application. This, however, is not that kind of a case. The blank date does not bring the case within the rule. The obligation is not silent as to interest, but provides that it is to draw interest at the rate of 6 per cent. per annum until paid. It was to be paid at the end of two years and "with interest."

It provides for an annual interest. It can not be said that the note only draws interest after maturity. It was to be paid at a given date, and it is unreasonable to suppose that a note for the payment of money on a particular day, with interest at a certain rate per annum until paid, could be construed to mean that the interest should commence on the day of payment and not before, for the law would give interest from that date.

The language specifying interest shows that it was the intention of the parties that the note should draw interest from date. We conclude that the parties were contracting for interest on the note for a period of time when the note would not draw interest except for such contract, and not for a time subsequent to the date when the note was to be paid. It was useless to make a contract for interest after the default of payment, when the law would allow interest on the note from such time.

We think Winn v. Young, 1 J. J. M., 52, supports our conclusion. Besides, the petition alleges that defendant agreed and promised to pay the note, with interest from its date until paid. The answer fails to controvert this allegation. The allegations of the petition, we think, are sufficient to authorize a recovery on the note.

The plaintiff held the note in suit and four others for the balance of the purchase money which the defendant had

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agreed to pay him for a house and lot in Lexington, Ky. The plaintiff without notice entered a motion to place the property in the hands of a receiver, and also offered and the court permitted an amended petition to be filed. Defendant filed an answer to the amended petition and resisted the motion to place the property in the hands of a receiver. On the hearing of the motion the defendant filed such affidavits as he desired.

If there was any irregularity in entering the motion and filing the amended petition the defendant waived his right to complain by entering his appearance to the motion and filing an answer to the amended petition.

Without reviewing the facts, suffice it to say that we are not inclined to disturb the judgment of the court placing the property in the hands of a receiver.

The judgment is affirmed.

CASE 63—PETITION EQUITY—MAY 26.

Fehler v. Gosnell.

Dickson v. Gleason.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. JUDGMENT IN REM.—APPEAL FROM.—A suit on apportionment warrants for street improvements, seeking a sale of the property is a proceeding *in rem.* against the property, and a judgment therein may be appealed from, although it be for less than one hundred dollars, no personal judgment having been sought or recovered.

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2. PROPER PASSAGE OF ORDINANCE—COMPUTATION OF TIME.—The passage by one board of an ordinance on the 5th of April, and by the other on the 19th of April is a compliance with the provision in charters for cities of the first class, that "no ordinance for any original improvement mentioned in this act shall pass both boards of the general council at the same meeting; and at least two weeks shall elapse between the passage of any such ordinance from one board to the other," the day upon which the first board passed the ordinance to be counted "as one day and part of the time." (Sec. 453, Ky. Stats.)
3. PRACTICE—WAIVER OF DEMURRER.—The overruling of a demurrer is not prejudicial to the substantial rights of the defendants where the same questions raised by the demurrer were raised in the answers of the defendants; and as each defendant filed such an answer to the petition, it must be regarded as a waiver or virtual withdrawal of the demurrer.
4. DEFECTIVE NOTICE—WHEN TOO LATE TO RELY UPON.—After a contract has been let and the work performed, it is too late to rely upon the objections that the notice does not inform the public of the general nature of the work, and that it does not state the nature and extent of the bond or security required.
5. STREET IMPROVEMENT—GUARANTY BY CONTRACTOR.—Under the authority conferred in the charter for cities of the first class to levy assessments against individual property-holders to pay the cost of street improvement, the city can not, by ordinance, require of the contractor a deposit in bonds equal to ten per cent. of the contract price, as a guaranty that he will keep the same in repair for five years, because such a provision necessarily increases the burden of the property-holders by adding the cost of repairs, for which the city alone under the provisions of the charter is liable.
6. SAME.—Such ordinance, however, is not absolutely void, and the contractor is still entitled to recover except to the extent the property owner's assessment has been increased on account of the requirement of such bond and security from the contractor.
7. EXECUTION OF CONTRACT BY CITY.—It is sufficient execution of a contract by a city that the mayor thereof shall sign his name as such, and affix the official seal of the city.

JOHN BARRET AND JOHN ROBERTS FOR APPELLANTS.

1. Publication of notice as required by section 67 of the "Act for the government of cities of the first class." is a condition precedent to the contract, and no valid contract can be made without the publication of these facts.

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2. No lien exists because the apportionment warrants, which are the basis of the action, were irregularly issued.
3. Under authority to order the paving of a street and to levy assessments against individual property owners to pay the expense of such improvement, a city can not force the property owners to pay for five years' repairs in advance. (Brown v. Jenks, 98 Cal., 10; People v. Maher, 63 N. Y., 83; McAllister v. City of Tacoma, 37 Pacific Rep., 447.)
4. Statutes granting to municipal corporations power to make special assessments in the nature of taxes should be strictly construed. (Caldwell v. Rupert, 10 Bush, 182.)

LANE & BURNETT FOR APPELLEES.

1. The required two weeks necessary to make the ordinance good *did* elapse between the passage of the ordinance from one board to the other as required by the statute. (Ky. Stat., sec. 2834.) It is provided by statute that "the day on which such notice is given or such act done may be counted as one day and part of the time." (Ky. Stat., sec. 453; Woods v. Patrick, Hardin's Reports, 457; Pollard v. Yoder, 2 A. K. Marshall, 264; Ogden v. Redman, 3 A. K Marshall, 234; Sanders v. Norton, 4 Monroe, 464; Chiles v. Smith, 13 B. M., 460; Batman v. Megowan, 1 Met., 533; Wood v. Commonwealth, 11 Bush, 220; Moar v. The Bank of Covington, 80 Ky., 305; Lebus v. Wayne, 14 Ky. L. R., 794.)
2. It is immaterial whether the necessary two weeks did elapse between the passage of the ordinance from one board to the other, in the case of Fehler v. Gosnell, as there is no denial by the appellants that all the necessary time did elapse in the Gosnell case.
3. Error in the overruling of a demurrer is waived by pleading over where the pleadings make the same questions as were made by the demurrer.
4. The contracts being signed by the chairman of the board of public works as such, and by the mayor of the city of Louisville as such, it is manifest that it was a contract with the city of Louisville. (Dillon on Municipal Corporations, 3d ed., sec. 452; Murphy v. City of Louisville, 9 Bush, 189.)
5. Copies of the ordinance authorizing the improvement and of the contract therefor and the apportionment, each attested by the comptroller were filed by the appellants as part of their answer, and the said copies so attested, proved every allegation of fact necessary to be established by the appellees. (Zable v. Louisville Baptist Orphans, etc., 92 Ky. 89; City of Louisville v. Johnston, 95 Ky., 254; Ky. Stats., sec. 2838.)

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6. According to the argument of appellant, section 14 of the ordinance of 1894 is void, and if void it does not compel contractors to keep up the streets for five years, nor does it interfere with the balance of the ordinance. (Murphy v. City of Louisville, 9 Bush, 189; State v. Copeland, 3 Rhode Island, 33. Lea v. Brumm, 87 Penn. St., 237; State v. Brown, 19 Florida, 563; State v. Dovers, 34 Ark., 188; Attorney v. Amos, 60 Mich., 372; Cooley on Constitutional Limitation, 6th ed., 209, 210, 211.) And if that section is void the ordinance must be read as if said section were not in it. Burnett's Code, 543; City of Louisville v. Muldoon, 15 Ky. L. R., 235.) The proper construction of section 14 of ordinance of 1894 is that the contractor was only bound to make good such portion of his work as might prove within the specified time to be defectively done. (Louisville v. Henderson, 5 Bush, 515; Covington v. Dressman, 6 Bush, 214; Fisher v. Iron Co., 10 Wis., 355; Baker v. Lorrillard, 4 Comstock, 261; Kearney v. Battles, 1 Ohio St., 366; Rocknell v. Nelson, 24 Ind., 424; Welch v. Sullivan, 8 Cal., 188; South v. Thomas, 7 Mon., 62; Franklin County v. L. & N. R. Co., 84 Ky., 65; Olcott v. Supervisors, 16 Wall., 678; Louisville v. Henderson, 5 Bush, 515; Gosnell v. City of Louisville, 14 Ky. L. R., 720; Schenectady v. Union College, 66 Hun., 73 N. Y., 187; People v. Maher, 56 Hun., 81; Raner v. Loud, 40 Pacific Rep., 377; Byrne v. The Luming Co., 38 Pacific Rep., 454; Slaughter v. City of Louisville, 89 Ky., 123.)

JUDGE DU RELLE DELIVERED THE OPINION OF THE COURT.

These cases have been heard together, and are appeals from judgments enforcing liens for the improvement of a part of Oak street, in Louisville, by original construction of the carriage-way.

The case of Dickson v. Gleason presents a question of jurisdiction not presented in the other case, which may be first disposed of. It was a suit upon apportionment warrants for street improvements, and the amount adjudged in the court below, as a lien upon the property of any one of the defendants, was less than $100, though the aggregate amount of the judgments is more than that sum.

It has been settled in this State that separate judgments

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can not be added together, in order, to give jurisdiction by the amount involved. "The legal questions involved may be identical, but the judgments are entirely distinct." (Zabel v. Harris, 82 Ky., 475; Oswald v. Morris, 92 Ky., 52). But the question remains whether this court has jurisdiction of the appeal in this case, irrespective of the amount of the judgment.

Section 950, Kentucky Statutes, provides: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than one hundred dollars, exclusive of interest and costs, nor to reverse a judgment granting a divorce. . . . In all other civil cases the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of all courts."

In common acceptation the words "judgment for the recovery of money or personal property" imply a personal judgment. In this procedure no personal judgment was sought or obtained. The proceeding was *in rem* against the property, and provides for a sale of the land. There seems little difference beween the judgment in this case for the sale of land under a proceeding *in rem* to satisfy the lien upon it, and a judgment for the recovery of land, which it is conceded may be brought to this court by appeal, irrespective of the value of the land. (Smith v. Moberly, 15 B. M., 72.)

In our opinion a judgment *in rem* to enforce a street assessment lien may be appealed without regard to the amount of money for which the lien is adjudged. The next question for decision is whether the ordinances providing for the improvements were so passed as to be valid.

By section 2834, Kentucky Statutes (a section of the act

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for the government of cities of the first class), it is provided that . . . "no ordinance for any original improvement mentioned in this act shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other."

In the case of Fehler v. Gosnell, the ordinance providing for the improvement passed the lower board on April 5th, and the upper board on April 19, 1894; and the appellants contend that two weeks did not "elapse" between the votes of the two boards, within the meaning of the statute. It is earnestly contended by counsel for appellants—and much authority from other States is cited in support of their position—that the intent of the statute was to provide for fourteen full days between the days of the passage of the ordinance by the respective boards; but this contention does not seem to us to be supported either by the ordinarily accepted use of the language or by the statutory rule of construction of this State. In ordinary language a provision that two weeks must elapse between two acts would be considered as fulfilled by the first act occurring Thursday, and the second act occurring Thursday two weeks thereafter.

Moreover, section 453, Kentucky Statutes, provides that "if a statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time, exclusive of the day for such motion or proceeding; but the day on which such notice is given or such act is done may be counted as one day and part of the time."

It is to be observed that the time required by section 2834 of the statutes is between the *passage* by one board and the *passage* by the other, and is not between the *day* on which

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it is passed by one board and the *day* on which it is passed by the other.

Without undertaking to answer in detail the ingenious argument of counsel for appellant, it is sufficient to say that, in our opinion, the statute requires only that the passage by the first board shall be fourteen days before the passage by the other board; and that, in this case, that provision has been complied with. (Woods v. Patrick, Hardin, 457; Pollard v. Yoder, 2 A. K. Marshall, 264; Ogden v. Redman, 3 A. K. Marshall, 234; Sanders v. Norton, 4 Monroe, 464; Wood v. Commonwealth, 11 Bush, 220; and Mooar v. Bank of Covington, 80 Ky., 305.) Nor can we concede much force to the contention that section 453 of the statutes, being a general law of construction, must yield to the peculiar language employed in the act for the government of cities of the first class. The latter act is also a general law, and must be so under the Constitution.

The next objection to the judgments in these cases is based upon section 67 of the act for the government of cities of the first class (Kentucky Statutes, section 2829), which provides that whenever the board of public works shall order any work to be done, to be performed by independent contract, there shall be prepared and placed on file in said office complete drawings and specifications of said work. "Thereupon said board shall cause a notice to be published in one daily or weekly newspaper, of general circulation, published in said city, once in each week for two weeks, informing the public of the general nature of the work, of the fact that the drawings and specifications are on file in said office and of the nature and extent of the bond or security required, and calling for sealed proposals for said work by a day not earlier than ten days after the first of said publications."

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Appellants claim that the demurrer to the petition should have been sustained, because it did not allege that the notice informed the public of the general nature of the work or of the fact that the drawings, etc., were on file in the office of the board or gave information of the nature or extent of the bond or security required.

The averment of the petition is as follows:

"And the plaintiffs say that the said board of public works caused to be printed and published, on the 5th and 18th days of April, 1894, in and by the said Evening Post and Louisville Anzeiger, advertisements; that, up to 12 m. on the 18th day of April, 1894, bids, offers and proposals would be received by said board of public works from persons offering, proposing and bidding to furnish all necessary labor and material therefor and to construct and complete the improvement of the carriage-way of Oak street, 30 feet in width, from the west line of 15th street to the center line of 16th street with the material and in the manner as prescribed by it and as provided for in the ordinance hereinbefore referred to as approved March 1, 1894."

After the demurrer was overruled, the defendants in each case pleaded over and filed with their answers copies of the notice which was actually given, and averred failure in said notices to comply with the provisions of the statute. The questions desired to be raised by the demurrer, therefore, were raised upon the actual facts of the notices, and we can not see that the action of the court in overruling the demurrers was error to the prejudice of the substantial rights of the appellants.

As each defendant filed an answer to the petition "it must be regarded as a waiver or virtual withdrawal of the demurrer, and leaves him in the same condition he would have

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been had the demurrer never been filed." (Patrick v. Conrad, 3 Marshall, 613; Curran v. Osborn, 10 B. Mon., 156.)

The objections to the sufficiency of the notices given by the board of public works are:

First. That the notice does not inform the public of the general nature of the work, but refers to the general ordinance regulating the improvement of streets.

Second. That it does not state the nature and extent of the bond or security required, but merely states that bond with approved security will be required.

These objections would have more force in a proceeding by way of injunction to prevent action under this ordinance. After the contract has been let and the work performed, we think it too late to rely upon these objections. (Section 2834, Kentucky Statutes.)

It is further objected that the apportionment warrants purport to have been ordered by the general council and are signed "J. Henry Hoertz, Clerk B. of P. W." This objection appears to us to be founded upon an erroneous theory that the apportionment warrants are the necessary basis for the action. If the warrants had been for other and erroneous amounts, the facts set out in the petition would justify a recovery by the plaintiff, provided the ordinance was in other respects valid.

We do not further consider these objections at this time because the remaining contention of appellants is, in our judgment, decisive of the case.

The ordinances for the improvement of the carriage-way of Oak street, one approved March 1, 1894, and the other May 15, 1894, provide that the carriage-way of Oak street between the points stated shall be improved "as designated in the ordinance concerning the improvement of streets with

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vitrified brick or block pavement." approved on the 5th day of February, 1894. By the 14th section of that ordinance it was provided:

"The contractor shall guarantee the faithful performance of his contract according to this ordinance, and the pavement therein specified and the materials composing the same shall be kept in good repair for the period of five years from the completion of the work and its acceptance by the board of public works; and, to protect the city as to the character of said work and material and such repairs as may be needed, the board of public works to be the judge, the contractor shall deposit bonds of the city of Louisville or of the United States, amounting to ten per cent. of the original contract price of the entire work, with the city treasurer, who shall hold the same, principal and interest, to be applied, so far as need be, in the necessary repairs of said work; and, at the end of said five years, the unexpended balance, if any, to be subject to the order of said contractor. Should the board of public works be of opinion that any repairs are needed on the work during the contract period, they may give the contractor notice in writing of such necessity, and he shall commence making the same within three days after such notice and prosecute the same with all due diligence to completion. Should he fail to begin said work within three days, this board may have said repairs made and charge same to said contractor; and to pay this expense of such repairs may sell for cash as many of the bonds herein mentioned as may be necessary to pay for same. Said sale to be made at public auction at such time and place as the board may order, notice of said sale being given by one insertion in the papers doing the city printing and advertising."

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Under sections 2833-4, Kentucky Statutes, it is only when the improvement of a public way is by original construction that the improvement is to be made at the exclusive cost of the owners of lots in each fourth of a square abutting upon said improvement. When the improvement is by reconstruction or repair, the cost of it is to be provided out of the taxes upon the city at large, special levies being provided for these purposes; and the contention of appellants is, that the ordinance above quoted, and the contract made in compliance therewith, provide for keeping the improvement in repair for the space of five years, and thereby charge the property-holder with the cost of repairs to the street for that period, in addition to the cost of the original construction.

The cases in this State are:

First. The City of Louisville v. Henderson, 5 Bush, 520, in which case the stipulation was that the contractor was required to keep his work in repair for six months after its reception by the general council; and the case was decided upon the theory that the thing stipulated was that "the work—his work—on the street he will keep in repair—not all injuries to the street which may result from other causes than defects in his work."

Second. The City of Covington v. Dressman, 6 Bush, 214. In that case the covenant was to keep the work in repair. Referring to the Henderson case the court said:

"This court held that a similar contract to keep in repair for six months, according to the evidence in that case, meant simply a guaranty that the work was well done, as if so it would need no repair in that time. It is certainly not a felicitous way of expressing the guaranty for sound, good work, yet that may be what it means; at least it would be so presumptively held on demurrer, when, if such is not the

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case, this may be put in issue and elucidated by the evidence; and, on the contrary, if it should appear that this imposes an additional burden on the property holders, and is not a mere guaranty by the contractor that he will perform his work, *they should, to that extent, be released;* for it is the duty of the city to keep such streets in repair and not impose this on the property holders."

In the second case referred to it may well be considered that a provision in the contract that the contractor should keep his *work* in repair for a limited period of time of six months or a year was merely an unfortunate mode of expressing the guaranty that the work was well and properly done at the time it was received by the city; as if well done it would need no repairs during the time specified; and the provision being specifically limited to the contractor's *work*, it may well be considered as not applying or intended to apply to any repairs which might be necessary from other causes than defects in the contractor's work.

But in the case of Gosnell, &c. v. City of Louisville, 14 Ky. Law Rep., 719, the Superior Court held that "the requirement in an ordinance, contracting for the improvement of a street, that 'the pavement and material composing the same shall be kept in good repair for the period of five years from the completion of the work and its accceptance by the general council,' does not bind the contractor to do more than remedy the defects in his work as they may appear or develop, and in no way compels him to keep the street in repair; and, as he can not be presumed to add that expense to the estimate, the abutting property owner, in paying his assessment for street building, pays nothing, either directly or indirectly, for repairs.

"Even if the provision quoted binds the abutting property

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owner to contribute to keep up the repairs on the street for five years, yet, as it is not so interwoven with the other provisions of the ordinance as to vitiate the whole, the contractor is still entitled to recover except to the extent the defendant's assessment has been increased on that account. And as there is nothing in the petition to show that there has been any increase in defendant's assessment on that account, the demurrer to the petition was properly overruled."

In these conclusions of the Superior Court we are unable to concur except the conclusion that the contract to keep up the repairs is not so interwoven with the other provisions of the ordinance as to vitiate the whole.

In this case the contractor is required not only to guarantee the faithful performance of his contract according to the ordinance, but that "the pavement therein specified and the materials composing the same shall be kept in good repair for the period of five years;" and, further, that "to protect the city as to the character of said work and material, *and such repairs as may be needed*, the board of public works to be the judge, the contractor shall deposit bonds of the city of Louisville or of the United States amounting to ten per cent. of the original contract price of the entire work with the city treasurer, who shall hold the same, principal and interest, to be applied as far as need be in the necessary repairs of said work."

This provision in our judgment not only embraces a guaranty of faithful work, but also a provision for repairs rendered necessary by other causes than defects in the contractor's work. We are equally sure that these provisions requiring the withdrawal of capital from the contractor's business, and its investment in bonds as a security for the

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making of repairs, of whose nature and extent he could not be certain, caused the bids for the work to be higher than they would have been without such provisions.

In the somewhat similar case of Brown v. Jenks, in the Supreme Court of California, 98 Cal., 10, the court said of a five years' stipulation to repair: "The bond is not only unauthorized by the words of that statute, but the requirement changes and may increase the burdens of the property owner. It is manifest that an obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore, the contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense is indefinite and the property owner must pay for the repairs in advance, whereas the statute provides for them after the necessity for them appears, when, it being contingent, he will be paying for the repairs which may never be required. And then they are assessed upon a different basis from that required by the statute. . . . Officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. The bond can not be substituted for the performance of this duty. Besides, it is for all repairs, and not such as may result from the defects in the work. It covers repairs for defects from unforeseen causes or wanton abuse of the street by individuals."

In the case of The People v. Maher, 63 New York, 83, the contractor was bound to keep the street in repair for seven years from the completion of the work. The court in that case said: "Other bidders may have thought it necessary to make their bids higher, for the reason that they would be required to keep the work in repair for seven years, and if no such requirement had been inserted such other bidders

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might have made a proposal lower than this contractor; then the property owners would have had less to pay, and for the ensuing years the city would have done repairs. . . . A further argument is made, viz, that since 1893 every contract of paving has required the contractor to keep the pavement in repair for a year; but this may reasonably be considered a time within which to test the pavement. Defects in construction may not appear immediately, and this time of one year may be proper in order that such defects may become apparent. By the present contract five per cent. of the price is to be retained for not more than one year as a guaranty that the work will be kept in good order. . . . The city, therefore, compels the property owner to pay the contract price not only for laying the pavement but for seven years' repairs. This it has no right to do." (McAllister v. City of Tacoma, 37 Pacific Rep., 447.)

We do not, however, concur with the ruling of the New York court in People v. Maher, *supra*, that the ordinance was entirely void, but concur with the opinion of the Superior Court in Gosnell v. City of Louisville, that "the contractor is still entitled to recover, except to the extent the defendant's assessment has been increased on that account."

The act for the government of cities of the first class contains the provision that "no error in the proceedings of the general council shall exempt from payment, after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned." (Kentucky Statutes section 2834.)

The city had authority to contract for the repairs of streets, provided such contract were not made in violation of

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other requirements of the statute; and the contractor can recover of the city such portion of the contract price as was for repairs to the street.

The contention of appellants, that the contract is invalid because, while reciting that the name of the city of Louisville "is hereto subscribed," it does not show the name of the city of Louisville signed by any official, need not be specially noticed. The seal of the city was affixed, and the mayor of the city, who was the proper person to sign the name of the city of Louisville, signed his own name as mayor. In our opinion this was a sufficient execution of the contract by the city. (Kentucky Statutes, section 2817.)

For the reasons stated the cases are reversed and remanded, with directions for further proceedings consistent with the principles of this opinion.

CASE 64—PETITION EQUITY—MAY 28.

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e117 494

Stephens et al v. Felton et al

APPEAL FROM KENTON CIRCUIT COURT.

1. CLASSIFICATION OF CITIES—ESTABLISHMENT OF TOWNS.—The act of September 30, 1892, classifying the cities and towns of this Commonwealth, deals only with those cities and towns which were incorporated by statute prior to that time, and the fact that a place was designated therein as a town of a particular class, did not have the effect to incorporate that town, when it was prior to that merely a civil district.

W. W. CLEARY AND D. A. GLENN FOR APPELLANTS.

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Stephens et al v. Felton et al.

1. An act of the legislature which mapped out a certain territory, by well defined boundaries, and which provided for the election of justices of the peace and a constable and a board of trustees, which trustees are empowered to appoint a clerk, treasurer, collector, and such "other corporation officers" as were necessary, and also empowered to pass by-laws and rules for the protection of persons and property, and gives control of the streets and roads therein, with power to levy taxes for grading and macadamizing same, and to impose a license tax on saloons, bowling alleys, pool-tables, etc., creates a municipal corporation, even though it is termed a district. (Malchus v. District Highlands, 4 Bush, 457.)
2. Section 156 of Constitution, and succeeding sections uses "Municipal Corporations" as synonymous with the words "Cities and Towns."

TISDALE & GRAY FOR APPELLEES.

1. A person outside of the boundary proposed to be incorporated as a town has no standing in court to object to the proceeding.
2. A person who resides within said boundary must present his objections in that proceeding and no other.
3. An act designating Milldale as a city of the fifth class did not create or establish a city of that name, because if it did, it would render that section of the Constitution null and void, which requires the incorporation of towns under a general law.
4. The act designating Milldale a city of the fifth class does not make the South Covington District a municipal corporation under a new name.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Thomas B. Stephens and others, appellants, brought an action to enjoin Matthew Felton and others from further proceedings to have established and incorporated as a town, by the name of "Latonia," certain territory described in the petition of appellees filed for that purpose, and then pending in the Kenton Circuit Court, and which territory appellants allege is within the boundary of what was originally designated by a statute as "South Covington District," but, as they aver, now an incorporated town known by the name of "Milldale."

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Peter Keller and others brought an action, alleging they are the duly elected trustees of "South Covington District," and ask an injunction restraining Charles G. Mason and others from assuming the offices of mayor, police judge and councilmen of the town of Milldale thereby superseding plaintiffs as such trustees.

The two actions being consolidated, judgment was rendered perpetually enjoining Mason and others from asserting claim to or exercising powers of the respective offices of mayor, police judge and councilmen, and dismissing the action of Stephens and others against Felton and others.

It appears that in 1884 certain territory within the county of Kenton was incorporated, and called "South Covington District," and, although provision was made in the statute for the election of trustees, having the same powers as trustees of a regularly organized town, still the territory, which included many farms, was recognized and intended as a civil district and voting precinct, within which were to be two justices of the peace and a constable, possessing and exercising fully within and for that territory the functions of those offices. The territory was not marked out and set apart as a town, but simply as a civil district, much less was it known or designated in the original statute as the town of "Milldale."

In that condition was the "South Covington District" when the statute of September 30, 1892, now chapter 89, Kentucky Statutes, was enacted, wherein, by section 2740, cities and towns of this Commonwealth were classified, "Milldale, Kenton county," being designated as a town of the fifth class; but as there had been no previous legislation incorporating that particular territory as a town, in meaning of chapter 89, and it would have been impracticable and

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oppressive to do so, as a very large part of it was used for farming purposes, we do not think section 2740 operated or was intended to so operate as to make it a town. The Legislature was then dealing with places which had been already created, and incorporated by statute as towns and cities, and upon the incorrect assumption that the territory in question, or certain described territory, had been so created and incorporated as a town, called Milldale, it was simply classified as such. That the Legislature did not intend thereby to create towns, not before existing as such, is shown by section 2713, same chapter, where creation and organization of towns is provided for.

Judgment affirmed.

CASE 65—PETITION ORDINARY TRANSFERRED TO EQUITY—

JUNE 6.

New Albany Woolen Mills v. Lewis.

APPEAL FROM WARREN CIRCUIT COURT.

1. CHATTEL MORTGAGE ON MERCHANT'S STOCK OF GOODS AND CREDITS. PRIORITY.—A mortgage by a merchant on his stock of goods and credits, which provides that the mortgagee may, under certain circumstances, have possession of same, but stipulating that until he does take such possession, the mortgagor is to retain the control and possession of the property, to be used by him in the usual course of business and to apply the proceeds of all sales to the satisfaction of the debts secured by the mortgage, is valid and enforceable; and where the mortgagor, in carrying on such busi-

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ness sells goods on credit, the mortgagee has a prior lien on such claim as against the other creditors of the mortgagor.

J. McKENZIE MOSS AND WRIGHT & McELROY FOR APPELLANTS.

1. Money is due on goods shipped by a mortgagee (to a purchaser), the day following his taking possession of the mortgaged property. If the title to the goods did *not* pass to appellants, then they held a mortgage lien upon them and in a contest with an *attaching creditor*, the mortgage lien is prior and appellants are still entitled to the money. The fact that a mortgagor retains possession of the mortgaged property does not render it void. (Coffey on Mortgages, secs. 508, 250; Nat'l Bank of Commerce v. Morris, 21 S. W. Rep., 511.)

W. E. GARTH FOR APPELLEE.

1. The conveyance called a mortgage is void against the creditors of the mortgagor and was made to defraud all other creditors besides the mortgagee.
2. The conveyance is constructively fraudulent as against creditors because it was made to secure a pre-existing debt.
3. The appellee is a citizen of Kentucky, the money was attached in the hands of another citizen of Kentucky, the mortgage was made and recorded only in another State, and even though such conveyance would be held valid where made, still it can not prevail, nor be enforced against the claim and lien of the attaching citizen of this State.
4. The most essential element of any lien upon personal property is for its immediate possession to accompany the transfer, and if possession is abandoned the lien is lost. (*Ex parte*, Foster, 2 Story (U. S.), 131.) The lien claimed in this action must be construed by common law principles, because made in another State and, according to that, possession is a necessary element to enforce it against a creditor. (2 Kent's Coms., p. 638.)
5. This conveyance, even if valid where made, can not be enforced against a fund attached by a citizen in this State, within its jurisdiction. (Johnson v. Parker, 4 Bush, 149.)
6. The principle of comity does not require our courts to recognize and enforce to the prejudice of our own citizens conveyances made by insolvent debtors under the laws of another State. (Coffin v. Kelling, etc., 83 Ky., 649; Burrilon Assignments, secs. 302, 306, 307, 310, 4th ed.; Hoyt v. Thomson, 6 N. Y., 320; Osborne v. Adams, 18 Pick., 248; Booth v. Clark, 17 How., 322.) A conveyance made in another State preferring a creditor in that State will not be disturbed, unless by this preference, some citizen of

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this State will be injured (Mathers, &c., v. Lloyd, trustee, &c., 89 Ky., 625.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The appellee sued the New Albany Clothing Co., a non-resident corporation, in the Warren Circuit Court, to recover on an account for services as a traveling salesman, claiming the sum of $270.

The petition contains a prayer "for a general attachment herein, to be levied on any of defendant's property in this State, and that J. E. Burch be summoned to answer as garnishee herein, and to state what amount he owes said defendant."

The record, however, does not show that the affidavit and bond required in such cases were made and executed, nor does it show that any attachment was actually issued. But the answer of J. E. Burch as garnishee is copied in the record, in which it was admitted that he owed the New Albany Clothing Co. $230 for goods purchased from the company "at their place of business in New Albany, Indiana, for which goods he agreed to pay said New Albany Clothing Co. the sum of $230 on the 15th day of November, 1893." No notice was taken by counsel for the appellants in their brief of the absence of the affidavit and bond and attachment, and we may assume that they are in the original papers of the case, although not copied in the record before us.

The New Albany Clothing Co. was not actually summoned, and made no defense to the claim set up in the petition. The appellants, however, were admitted on their petition as defendants and claimants of the property of the defendant company, and afterwards by amended answer

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set up a mortgage executed to them by the defendant company on all of its property, alleging that the goods sold and shipped to Burch were part of the goods embraced in their mortgage, and claiming the amount due from Burch for the goods by virtue of the said mortgage, and on their motion the case was transferred to equity. On final hearing the court below sustained the attachment of the appellee, and adjudged in substance that he was entitled to the money owing by Burch for said goods under his attachment, and dismissed the claim of the appellants, and gave judgment against them for costs in favor of the appellee. From that judgment this appeal is prosecuted.

The instrument of writing executed by the New Albany Clothing Co., under date of August 14, 1893, to the appellants, is on its face a mortgage of the property and credits of the said company to secure the debts it owed to the appellants, aggregating the sum of $28,857.83. The mortgage was executed and recorded in Floyd county, Indiana, where the company was engaged in business under its charter, and the debts intended to be secured by the mortgage were all created before it was executed. It was provided in the mortgage that under certain circumstances the mortgagees (the appellants) might "take, have and hold the absolute and exclusive control and possession of the property, rights and credits hereinbefore mentioned," and might "sell the same at public or private sale, upon reasonable notice," to satisfy and discharge the indebtedness secured by the mortgage. After this provision the following stipulations were made: "It is further stipulated and agreed between the parties hereto that until such time as the said parties of the second part, or either of them, shall choose to take the possession and control of said property hereby

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mortgaged, sold and transferred to them, the said party of the first part may retain the possession and control of said property, and may use such property in the usual course of its business, or may sell or dispose of any part of the same in the usual course of trade and business, keeping an account of all such sales and transfers, and applying the proceeds thereof to the payment and satisfaction of the indebtednesss hereby secured, and accounting to said parties of the second part, at any time and upon demand, for said proceeds of such sales."

The transaction was not a secret one, and there is nothing shown in this record that in the slightest degree impugns the good faith of the parties to it. They are not chargeable with a fraudulent purpose or intent by reason of the fact that the mortgagor retained possession of the mortgaged property, nor was there fraud in the attempt to secure the debts owing by the company to the appellants, even though the debts were in existence, and some of them were due at the time the mortgage was made. And although the statute of this State affords a remedy to an excluded creditor in case a debtor, in contemplation of insolvency, by mortgage or assignment, attempts to prefer one or more of his creditors, yet a mortgage or assignment made for such a purpose is not on that account fraudulent and void, but may be enforced for the exclusive benefit of the preferred creditors, unless the excluded creditor commences action within six months after the act of preference. (Whitehead v. Woodruff, 11 Bush, 209; German Bank v. Jefferson, 10 Bush, 326.)

There was no attempt to show that the mortgage was void or even voidable as an attempt to prefer creditors under the laws of the State of Indiana, and counsel for the appellee

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has failed to show that it is opposed to the general policy of the laws of this State in this regard.

It conclusively appears from the evidence that in pursuance of the stipulations of the mortgage the appellants took possession of the mortgaged property through the Fidelity Trust and Safety Vault Co. on the 9th day of November, 1893, and W. C. Nunemacher, who was the treasurer of the mortgagor company, was appointed the active agent of the appellants to take charge of the mortgaged property and conduct the business in selling and disposing of the property. Previous to that time, however, the goods were being disposed of, under the stipulations of the mortgage, in the regular course of business, by the mortgagor company through its officers or agents, for the benefit of the appellants. And about the last of October or the first of November the said J. E. Burch, who was engaged in mercantile business in Bowling Green, purchased a bill of goods amounting to $230, as stated in his answer as garnishee and in the testimony of Nunemacher, the latter being then in charge of the business in the manner above indicated. But the goods purchased by Burch were not shipped to him until the 10th day of November, the day after the appellants took possession of the property as above stated. And according to Nunemacher's testimony the goods shipped to Burch were on hand at the time the mortgage was executed, and were included in the schedule of property embraced in the mortgage. And notwithstanding the fact that Burch did not know, as testified by him, that the mortgage was in existence at the time of his purchase, and the further fact that they were billed to him in the name of the New Albany Clothing Co., still it is clear that the appellants then had a lien on them under their mortgage, and the sale of them to

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Burch was actually made by Nunemacher, who was then conducting the business and disposing of the mortgaged property, as the agent of the appellants and for their benefit. It follows from this that the appellants were entitled and are still entitled to the money owing by Burch for the goods purchased by and shipped to him, and that their claim is superior to the claim of the appellee under his attachment.

For the foregoing reasons the judgment of the court below is reversed, and the cause remanded, with directions to discharge the attachment of appellee as to the money garnisheed in the hands of Burch, and to require Burch, the garnishee, by appropriate orders, to pay the same to the appellants.

CASE 66—PETITION ORDINARY—JUNE 6.

99 404
100 446

East Tennessee Telephone Company v. Simm's Administrator.

APPEAL FROM HARRISON CIRCUIT COURT.

1. PLEADING—DEATH BY WRONGFUL ACT.—In an action under the provisions of section 241 of the Constitution seeking damages for death by negligence or wrongful act—that section being in force at the time of the loss of life, though the legislature had not then provided how the recovery in such cases should go and to whom it should belong—the personal representative of the deceased has a right of action without regard to whether the deceased left a widow or child or not; and the petition was good without alleging there was such widow or child.

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2. SAME.—The provisions of that section (241) gave a right of recovery to the personal representative in any event, and only left to the legislature the mere distribution of the recovery.
3. PLEADING—COMPENSATORY DAMAGES.—Such a suit where recovery is sought for the death of plaintiff's intestate, caused by the "willful, gross and reckless negligence" of the defendant, is not an action for willful neglect, the word willful being manifestly used as the synonym of "gross;" and an instruction as to compensatory damages was properly given.
4. EVIDENCE—ADMISSIONS BY SECRETARY OF CORPORATION.—A letter from a secretary of a corporation, written after the transaction occurred, which is the subject of the suit, and making damaging admissions against the company, was not competent evidence; and even if otherwise competent, it contained a mere opinion based on hearsay, as the writer had no personal knowledge of the facts.

J. Q. WARD FOR APPELLANTS.

1. Where there is an undenied allegation of notice of danger and that the deceased knew of it and put himself in the way of said danger no damages can be recovered. (Derby Adm'r v. K. C. R. R. R. 9 L. R., 154.)
2. An act of a servant or agent, though evidencing negligence can not amount to willful negligence by co-operating with another negligent act of another servant of the same master, which latter act was unknown to the agent or servant at the time the negligent act complained of was done. (K. C. R. R. v. Sommer's adm'r, 7 L. R., 818; L. & N. R. Co. v. Brice, 8 L. R., 271; Collins v. C., N. O. & T. P. Ry. Co., 13 L. R., 670.)
3. Where the charge of willful negligence is not sustained, evidence of contributory negligence is admissible.
4. An action under section 3 of chapter 57, General Statutes, can not be maintained without alleging that the intestate left a wife or child. (Hennings v. Louisville Leather Co., 11 L. R., 544.)
5. Sections 1 and 3 of article 1 of chapter 57 of General Statutes were not repealed by section 241 of the Constitution. (Wright v. Wood's adm'r 16 L. R., 338-9.)
6. In an action against a telephone company for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence in allowing a 'dead wire" to remain for two years close to an electric light wire, it is error to admit in evidence a letter written by defendant's secretary to the effect that said "dead wire" was the cause of his death.

WARD & LAFFERTY FOR APPELLEES.

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1. A letter written by defendant's secretary after the death of plaintiff's intestate, showing that the "dead wire" caused his death, is competent evidence.
2. Compensatory damages can be recovered by an administrator for the death of his intestate caused by defendant's negligence under section 241, Constitution.
3. It is not necessary in an action under section 241 of the Constitution by an administrator for the death of his intestate, to allege that intestate left a wife and child.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellee, as administrator of Richard Simms, recovered judgment against the appellant for $7,000 in damages for the death of his intestate, which was caused, it is alleged, by the willful and gross negligence of the appellant and the electric light company. Briefly stated, the facts are that in 1887 the appellant, then operating a telephone system at Cynthiana, put up a wire from its central office in that city to the residence of W. T. Handy, about one mile out. On December 13, 1892, this wire was still in use by Handy, or in condition for use, under his lease or contract with the company, though, it appears that he was away, with his family in Florida, and his term of rental was out, or about out. Simms, as a tenant, occupied two rooms in the rear of the Handy residence, and, for purposes of protection, overlooked the premises. At about 10 o'clock on the night of the 13th, the family of Simms heard a noise in front of the residence, and, in company with his son and two nephews, he went around to the front porch with a lantern. They discovered the storm doors swaying back and forth, and, fastening them, they came down from the porch on to a pavement, when sparks were seen on some trellis wires about the porch. Simms stepped off the pavement, saying, "What is that?" at the same time reaching out

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towards the wires. His nephew exclaimed, "Don't touch it!" But at that instant Simms fell dead, and it is supposed that he had touched the wires with his outstretched hand, although there were no burns found on his hands or body. These wires had become charged with electricity from contact with the telephone wire leading from the box in the hall on to the porch, and thence to the ground. And the telephone wire had, in turn, become overcharged from contact with the electric light wire within the city. Just how this came about forms the chief ground of dispute in this record. It appears that some two years prior to the night in question the telephone company had discontinued a wire theretofore rented to Victor & Whaley, and this wire had been taken down, save a few hundred feet which had been left on the poles. One end of this "dead wire" was connected with the Handy wire, and the other was fastened to a bracket on a pole of the Western Union Telegraph Company, also in use by the light company. This bracket became loose, and turned down, and the dead wire was left to sway and vibrate, sometimes touching the light wire. On the evening in question there was a heavy wind, and some rain, and at about 5 o'clock the bracket was so shifted that the two wires were brought in contact, the one perhaps resting on the other. The current of the electric plant had been turned on at about 4:30 o'clock that evening, and a disturbance was noticed at the central office of the telephone company between 5 and 6 o'clock, when the wire in the keyboard was burned. An investigation made at once seems to have located the cause of the disturbance on the Handy wire, but there the matter rested for the night. The effort of the plaintiff was directed to showing negligence on the part of the telephone company in

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allowing its dead wire to hang for so long in close proximity to the light wire, and in so putting up the wire at the residence of Handy as that it could come in contact with the trellis wires then about the porch. Without setting out the details of the proof, it is sufficient to say that it conduced to show negligence in the particulars mentioned; and the court therefore properly overruled the appellant's motion for peremptory instructions upon the conclusion of the plaintiff's proof. Such a motion, however, was sustained for the light company. The appellant attempted to show that it had kept up the usual inspection of its line, and had no reason to apprehend danger from the dead wire remaining on the poles; that the trellis wires were so placed by Handy, or others over whom it had no control, as that connection with its wire was made without its knowledge or consent; and, moreover, that the deceased was the subject of heart disease, and likely to die suddenly, under undue excitement, and that he had probably died from natural causes, and not from an electric shock. The jury found against these contentions, and we proceed to notice the errors of law complained of.

And first it is insisted that the petition was fatally defective, in that it failed to allege that the intestate left a wife or child. We are of opinion that this was not necessary. Const, section 241, provides that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery

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shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person." This section was in force when Simms lost his life, though the legislature had not then provided how the recovery should go, or to whom it should belong. It was wholly immaterial, therefore, whether there was, or not, a widow or child. It is true that under the old statute (Gen. St. c. 57, section 3), providing for a recovery where death was caused by "willful neglect," it had been held more than once that no recovery could be had unless the deceased left a widow or child; but it seems probable, as held in Wright v. Woods' Adm'r, 96 Ky. 56, that the constitutional provision had in view the correction of this supposed defect in the law, and gave a right of recovery to the personal representative in any event, leaving to the legislature the mere distribution of the recovery. And it is true that in Wright v. Woods, where the recovery had been effected in a suit under the old statute on "willful neglect," this court held that the distribution should be made under that statute, and to this extent the old statute was said to be still in force, or was until in July, 1893, when the present statute on the subject was adopted. The provision of the constitution (section 241) authorizes a recovery for death resulting from negligence, including all supposed degrees of it, and was intended to abrogate the further use of the words "wilful neglect" in our law. The present statute follows the constitution, and nowhere uses those words, but does provide that if the "negligence" is gross, or the "wrongful act" by which death is caused is willful, punitive damages are recoverable. The words "wrongful act," of the constitution, and "willful act," of the statute, do not primarily refer to an act of negligence, which is the opposite of

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those terms. The word "gross," when used to qualify the word "negligence," is a relative one, and is supposed to emphasize merely the want of due care and negligence, as "gross" or "ordinary," according to the circumstances, relations, and conditions under which due care is omitted to be exercised. In this case there appears to have been no intention of conforming the petition to the old statute. It is not a suit for "willful neglect," but recovery is sought for the death of the plaintiff's intestate, caused by the "willful, gross, and reckless negligence" of the company, the word "willful" being used, manifestly, as the synonym of "gross." The demurrer to the petition was therefore properly overruled. It follows from what we have already said that compensatory damages were recoverable in the action, and hence there was no error, as is insisted by counsel for appellant, in the instruction authorizing such recovery. The case relied on, of Railroad Co. v. Privitt's Adm'r, 92 Ky. 223, was one under the old statute, and it was held that, unless "willful neglect" was shown, no recovery could be had. We perceive no error to appellant's prejudice in any of the instructions given.

The court, however, committed a serious error, to the prejudice of the company, in permitting the alleged letter of Mrs. Lake to Handy to be read as evidence. She was the secretary of the company, it is true, but she was not its agent in making damaging admissions after the transaction occurred in which Simms lost his life. Railroad Co. v. Ellis' Adm'x (Ky.) 30 S. W. 979. The letter was to the effect that the dead wire caused Simms' death, and completely silenced the company's contention that Handy's trellis wires were placed in contact with the telephone wire without its knowledge, and thus caused his death, or contributed to it, or

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that his death was due to natural causes. Moreover, if otherwise competent, it must have been mere opinion, based on hearsay, as the writer had no personal knowledge of the facts, though the statement, coming from one connected with the company, had the force of an absolute admission, and one fatal to the company's defenses. For the reason indicated the judgment is reversed, for proceedings consistent with this opinion.

CASE 67—PETITION ORDINARY—JUNE 9.

Louisville & Nashville Railroad Company v. Gaines.

APPEAL FROM CARROLL CIRCUIT COURT.

1. RAILROADS—MISTAKE OF AGENT IN SELLING TICKET—EJECTION OF PASSENGER.—When, through the mistake of a ticket agent, one is sold a limited ticket for which he had not applied, and, after missing the train on the day of purchase, took the next train, which was the following day, and was forcibly ejected therefrom by the conductor because the ticket was out of date the previous day, the passenger may maintain his action in tort for damages.

WINSLOW & WINSLOW FOR APPELLANTS.

1. The court erred in not requiring plaintiff to elect whether he would proceed for tort or for breach of contract and in not requiring plaintiff to paragraph his petition.
2. If the action was for breach of contract alone the court did not have jurisdiction, because the contract was not made or was not to be performed in Carroll county.

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3. The action in tort can not be sustained, because a railroad conductor may demand a ticket as evidence of a passenger's right of passage, or on failure to produce, he may demand fare, and on refusing to pay fare, may eject the passenger from train, using only necessary force. (McKay v. The Ohio River R. R. Co., 11 S. E. Rep., 737; 34 W. Va., 65.)
4. The action must be on the contract where a passenger pays a railroad agent for a certain trip, and by mistake of the agent, is given a ticket not answering for the trip, and where the conductor refuses to recognize such ticket, and demands fare, which the passenger refuses to pay, ejection of passenger, using only necessary force, will not be ground for an action for tort. The action must be based on the breach of contract to convey passenger. (McKay v The Ohio River R. R. Co., 11 S. E. Rep., 737; 34 W. Va. 65.)

GAUNT & DOWNS FOR APPELLEE.

1. The rule is well established that where there is evidence to support the finding of the jury on a question of fact, that this court will not interfere with the verdict, whatever may be the weight or the preponderance of the evidence.
2. Where one calls for a railroad ticket to a certain point, and receives from the company's agent a ticket purporting to be to that point, he is entitled to be carried there by the company; and if he fails to receive a proper ticket by mistake or other fault on the part of the agent of the company, the conductor has no right to eject him from the train, and if it is done the company must answer therefor in damages. (Hufford v. R. R., 7 West, 859; McGinniss v. Mo. Pac. R. R. Co., 4 West, 797.)
3. A passenger may recover for wrongful expulsion from the train, although the conductor merely orders him off without putting his hands on him. (Cent. R. & B. K. G. Co. v. Roberts (Ga.), 18 S. E., 315.)

J A. DONALDSON ON SAME SIDE.

No brief in the record.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellee purchased of the ticket agent of the appellant a first-class ticket to Crab Orchard from the city of Cincinnati. The office was at Fourth and Vine streets.

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He paid for his ticket and proceeded at once to the depot, where he discovered the train was then moving off and out of his reach. He returned to his hotel, and left on the next train the following morning.

After starting on his journey the conductor on the train of appellant applied for his ticket, and, upon examining it, found it was a first-class limited ticket, and out of date the day previous. He refused to receive the ticket, and under instructions from those in authority, having consulted them by telegram, took the appellee by the lapel of his coat and against his will led him off the train. Some loud talking between them preceded his removal, the appellee refusing to leave the train, but claiming the right to be carried to his place of destination.

When the ticket agent made out his ticket he placed it in an envelope and handed it to the appellee, the latter making no examination of it.

The appellee was taken from Covington to Milldale, and there transferred to another train of appellant, and from this last train was ejected.

The appellant's agent contradicts the statement made by the appellee, and says he sold him the ticket, as a limited ticket, for $4.39, while the regular first-class ticket was $6, and this would seem to sustain the agent in his version of the matter.

We think, however, there was evidently a mistake made by the ticket agent, as it does not appear the appellee knew they were selling such tickets, and he swears he applied for a first-class passenger ticket to Crab Orchard, and there is no doubt but what he supposed he had paid for such a ticket. So positive was he of his right to go upon the ticket that he requested the conductor to inform himself by tele-

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gram, and the answer he received was to "*put* him off the train." He was made to leave the train about thirty miles from his home, and it seems to us without much reason on the part of the company, but, in so far as the conductor was concerned, it was his duty to obey the orders of his superiors, and he is in no wise to blame. He, of course, looked to the ticket presented to him, and by that he was to be controlled in his action, and but for the mistake made by the ticket agent the company could not be held responsible.

It is claimed, however, there was no mistake made, and there was none if the ticket agent is right in his recollection of what transpired when he sold it. but the jury heard the testimony, and seem to have been satisfied the history of the purchase of the ticket was as stated by the appellee.

It is argued that no recovery can be had except on the breach of the contract to carry, and not then if the ticket presented does not evidence the obligation to transport the passenger. This would evidently be the correct rule if the mistake had not been with the company, as it can scarcely be held that a ticket worthless for travel when sold by the agent of the company can justify the ejection of the passenger from a train when the fault is that of the company, and not that of the passenger.

It is claimed that this is an action *ex contractu*, and not *ex delicto*. We can not take this view of the petition. While many unnecessary facts are stated in the petition, they are mere matters of inducement, and what transpired when the ticket was purchased, and his going to the depot and entering the train, were facts stated, showing the rights of the plaintiff as a passenger, or, in other words, his right to be on the train.

When the appellee was taken off the train against his

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will, by the conductor laying hands upon him for that purpose, it was an assault and battery; and while no wounding or bruising of the person appears, the doctrine of *molliter manus imposuit* does not apply because the conductor had no right to remove him from the train.

The entire case rests on the testimony of the appellee and that of the ticket agent, and the verdict not being palpably against the weight of the evidence the verdict of $200 will not be disturbed.

The right to bring such an action is evident. If the fault of the agent of the company, the remedy by an action for tort, where the passenger is forcibly ejected, ought not to be questioned. (Hufford v. Grand Rapids & I. R. R. Co., 7 West, 850; Lake Erie R. R. Co. v. Fixie, 11 American & English Railroad cases, 109; Pittsburg R. R. Co. v. Hennyh, 39 Ind., 509; Head v. Georgia Ry. Co., 11 American State, 434.)

There was no question made as to the jurisdiction for want of service, but, on the contrary, the party appeared and made defense.

Judgment affirmed.

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CASE 68—PETITION ORDINARY—JUNE 10.

Ratcliffe v. Louisville Courier-Journal Company et al.

APPEAL FROM MARION CIRCUIT COURT.

1. LIBEL—EVIDENCE.—When a defendant, in an action for libel, pleads that the libelous matter complained of by the plaintiff is true, the character of the plaintiff is in issue, and evidence concerning his general character is admissible.
2. SAME.—Where the libelous charge was that "he had been in more rows than any other one man in this county," and the answer pleaded the truth of the charge, it was proper to bring out in evidence before the jury, instances of quarrels and disturbances in which the plaintiff had been engaged in that county; and how far such specific acts went toward establishing the truth of the charge was a question for the jury.
3. ERRORS ON TRIAL—SUBSTANTIAL RIGHTS.—Although errors were committed against the appellant on the trial in the lower court, his substantial rights were not prejudiced thereby because the jury found in effect that the libelous part of the article complained of was substantially true.

L. S. PENCE FOR APPELLANT.

1. The appellant had the right to serve summons on both the agent and the president of the publishing company, and if the first summons was not sufficient the last one was, to all intents and purposes, and the court erred in ruling otherwise. (Adams Express Co. v. Crenshaw, 78 Ky., 136; L. & N. R. R. Co. v. Coleman, 7 Ky. L. R., 229; Bridge Co. v. Douglas, 12 Bush, 711.)
2 The mere fact that a publisher of libelous words heard them is no defense in law. (Mallory v. Pioneer Press Co., 34 Minn., 521; Riley v. Lee, 88 Ky., 614.)
3. No court is justified in making specific acts a criterion to investigate one's general character and questions asked along this line

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are incompetent. (Campbell v. Bannister, 79 Ky., 208; Thurman v. Virgin & wife, 18 B. Mon., 630; Evans v. Smith, 5 Monroe, 363; Henderson v. Hayne, 2 Met., 348; Hume v. Scott, 3 Marshall, 261.)

4. The court erred in instructing the jury that they should find only actual damages. The plaintiff, in cases of libel, is not required to establish item by item, the amount of damage which he has sustained. (Alliges v. Mail Printing Asso., 66 Hun (N. Y.), 626; Blocker v. Schoff, 83 Iowa, 265.)
5. To authorize the jury to award punitive damages in an action of libel it is not necessary that an intention to injure should be shown. (Courier-Journal Co. v. Pope, 15 Ky. L. R., 877.)
6. The damages in an action for libel are not only compensatory, but where malice or gross negligence is shown, punitive damages may be given. (Cooper v. Sun Co., 57 Fed. Rep., 566.)

THOMPSON & M'CHORD ON SAME SIDE.

No brief in the record.

F. HAGAN FOR APPELLEE.

1. The court erred in allowing to be admitted as evidence a picture printed in another publication, printed in another State and issued after the publication complained of had gone before the public.
2. Appellee could not have been injured by the publication complained of because all the article that was libelous was shown to be true.
3. Stronger language than any complained of in the publication, has been held by the courts not to be libelous. (79 Ala., 514; 66 Iowa, 694; Walker v. Tribune Co., 29 Fed. Rep., 827.) According to classifications of libels in Newell 67, this publication was not libelous. Without malice, either express or implied, an action for libel will not lie.

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages for an alleged false, malicious and libelous publication concerning the appellant. It was a dispatch sent by a special correspondent to and published in "The Times" newspaper, describing the alleged tragic killing and decapitation of the appellant

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by one Mahoney at his distillery in Marion county, as the result of a quarrel which it was stated the appellant "picked with Mahoney," who was described as "a quiet and peaceable man," while of the appellant, whose home was said to be in Marion county, it was stated "he has been in more rows than any other one man in this county." The dispatch was embellished in the columns of "The Times" with startling and sensational head-lines like the following: "Brained his adversary!" "And then deliberately chopped off his head!" These were designed and had the effect to attract the attention of the readers of "The Times" to the libelous dispatch, and thus cause it to be widely circulated in Marion county "among his friends and acquaintances, and the public in general," resulting in great damage to "the good name of plaintiff," who, it was alleged, by reason of "said false publication," had already been exposed "to hatred, contempt and ridicule."

In proof of the extensive circulation of the libel and in aggravation of the damages, during the progress of the trial the court, over the objections of counsel for the appellees, permitted the appellant to exhibit in evidence before the jury a copy of the "Police Gazette," published in New York, containing the substance of the obnoxious publication, illustrated with a picture representing Mahoney in the bloody act of decapitating the appellant with the hatchet with which he had dealt him the fatal blow.

The answer of the appellee company contained a denial of the malice charged in the petition and of the injury to the character of the appellant by reason of the publication of the alleged libel, and an averment in substance of the truth of the statement that the appellee picked a quarrel with Mahoney at his distillery, who struck him a fearful

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blow with a hatchet, and that appellant's home was in Marion county, "and he had been in more rows than any other one man in this county."

The issue being joined, the case was submitted to a jury, and, after the evidence was heard and the instructions given, the jury returned a verdict for the appellees, upon which a judgment was rendered dismissing the petition and for appellee's cost against the appellant, from which judgment this appeal is prosecuted.

During the progress of the trial many witnesses were introduced in behalf of the appellee, and testified concerning the general character of the appellant. This was proper, for in such cases the character of the plaintiff is deemed in issue, as it is the foundation for his claim for damages (Sutherland on Damages, second edition, section 152); but the appellees were permitted, over the objections of the appellant, to bring out in testimony before the jury many instances of quarrels and disturbances in which the appellant had been concerned or engaged in Marion county, and this is earnestly urged as error by counsel for the appellant.

We hold, however, that this testimony was properly admitted, as it was pertinent to the issue made by the averment in the answer of the truth of that part of the obnoxious publication which represented the appellant as having been in more rows than any other one man in the county, which may be said to be the only part of it that was libelous *per se*.

Just how far the testimony as to specific acts of disorder on the part of the appellant went towards establishing the truth of the libelous charge was for the jury to decide. Such testimony would not have been admissible to impeach the general character of the appellant, and it was not offered

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or admitted for that purpose; but that the appellees had the right to prove the truth of the alleged libelous charge in this way there can be no doubt.

Exception was also taken in behalf of the appellant to the testimony of some of the witnesses who were introduced to impeach his general character on the ground that they did not qualify themselves as witnesses as to his general character by showing that they were acquainted with it. A few of the witnesses did not show clearly that they were acquainted with appellant's general reputation, in strict compliance with the rule on that subject, but on examining their testimony, we do not think, in the light of all of the testimony, that it was prejudicial to the substantial rights of the appellant on the merits.

The instructions given by the court contained a fair presentation of the law of the case. After properly defining malice, in its legal sense, to be a wrongful act done to another without just cause or excuse, the jury were told in substance that the appellant was entitled to a verdict at their hands, if the evidence showed that the publication was untrue, and that, in that event, the amount of recovery was to be fixed by them, not exceeding the amount claimed, from a consideration of all the facts and circumstances proved in the case. This was done at the request of the appellant, and, although excepted to by the appellees, it was not objectionable when taken in connection with other instructions that were given.

Two other instructions were requested by the appellant, and refused by the court. In one of them the court was requested to submit a state of case in which the jury might give punitive damages, and was properly refused because there was no evidence that would have authorized such an

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instruction. The other was properly rejected because it was substantially covered by the instruction above recited, submitting the state of fact upon which the appellant was entitled to recover, from the standpoint of the appellant.

In behalf of the appellees counsel requested the court to instruct the jury in substance, first, that if the dispatch containing the alleged libelous statements was published *without actual malice*, but in good faith, and in the belief that it was true; and, second, that if the publication was proved to be true in fact, or *substantially true as published*, they should, in either event, find for the appellees. These requests were granted, and exception was taken in behalf of the appellant.

The second request was properly granted (Vance v. Louisville Courier-Journal Co., Ky. Rep., 41); but the first is subject to the objection that it based the immunity of the appellees upon the absence of *actual malice*, when the state of facts had been submitted upon which the jury were told the appellees might be held liable, from which, if they were proved, malice was to be implied; but, looking at the whole case, we are satisfied that the substantial rights of the appellant on the merits were not prejudiced by this objectionable instruction. And, upon the facts and circumstances in evidence and the law as given, the jury having found in effect that the libelous part of the publication was substantially true, and there being sufficient evidence to support that finding, and no error having been committed that was prejudicial to the substantial rights of the appellant, the judgment is affirmed.

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CASE 69—PETITION EQUITY—JUNE 10.

Board of Councilmen of City of Frankfort et al v. Murray.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. STREET IMPROVEMENT—VALIDITY OF ORDINANCE.—An ordinance passed by the common council of a city of the third class, requiring owners of certain property to construct sidewalks, curbing and gutter-ways in front thereof, within thirty days, thereby giving the owners an opportunity to do the work themselves before letting it out by contract to others is not violative of the provisions of the charter (Sections 3449 and 3450 Kentucky Statutes,) that the council may pass ordinances to require the improvement of streets at the cost of the abutting owner, and that upon the passage of such ordinance it shall be the duty of the mayor to enter into a contract with any person offering to do the work on the best terms, etc.
2. SAME.—An ordinance locating the streets to be improved, and sufficiently designating the lots and parts of lots, and providing that the side walks were to be of "brick and curbed with stone and provided with stone gutter-ways; the sidewalks to be eight feet wide from the line of the respective lots to the inside line of the curbing, and to be at the grade or elevation heretofore fixed by the city engineer and adopted by this board, and as shown and established by stakes already set in front of said respective lots or parts of lots," is a sufficient compliance with the provision in the charter requiring that such an ordinance shall "fully declare and prescribe the kind and extent of improvements to be made."
3. DELEGATION OF LEGISLATIVE POWER.—The ordinance is not invalid because the kind of stone and its thickness and width are not prescribed; some of the details of this kind of work may properly be left to the city engineer, without a violation of the law, forbidding the delegation of legislative power.

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HUGH RODMAN AND W. H. JULIAN FOR APPELLANTS.

1. The city charter was not only substantially but literally complied with; the appellee knew that improvements were being made all the time and raised no objection until he was called upon to pay, and he should reimburse the city. (Fox v. Middlesborough Town Co., 16 Ky. Law Rep., 455; Embry v. San Francisco Gas Co., 28 Cal., 372; Elliott on Roads and Streets, pages 415, 416, 420.)

GEO. C. DRANE FOR APPELLEE.

1. The ordinance in question is invalid because it orders and directs the *lot owners* "to cause good and sufficient sidewalks to be laid in front of their respective lots," which is violative of section 172 of the charter for cities of the third class, which provides that "upon the passage of an ordinance requiring the improvement of streets or alleys or parts thereof, it shall be the duty of the mayor to enter into a contract with any person or persons offering or agreeing to do the work required to be done by such ordinance upon the best and most advantageous terms."
2. The provision in general terms in the ordinance that the sidewalks are "to be paved with brick and curbed with stone, and provided with stone gutter-ways, and said sidewalks to be eight feet wide from the line of the respective lots to the inside line of the curbing," is not a compliance with the provision of section 171 of the charter that such ordinance "shall fully declare and prescribe the kind and extent of improvements to be made;" under that provision the ordinance should have prescribed the kind of stone to be used in curbing and guttering, whether dressed or undressed, the thickness and width of the stone, and the mode of construction, etc.
3. The ordinance delegated to the city engineer the authority to direct and control the mode and manner of the work, and is therefore invalid because it is an attempted delegation of legislative power. (Hydes v. Joyce, 4 Bush, 464.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The common council of the city of Frankfort, a city of the third class, adopted an ordinance requiring the appellee and other owners of certain described property, within thirty days, to construct sidewalks, curbing and gutter ways,

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of a particular description, in front of their respective lots.

The appellee, failing for the time indicated to comply with the ordinance after notice of its passage, the mayor, after advertisement as provided by law, contracted for the construction of the work with the appellant, Noonan, which contract was ratified by the council. The work was there upon completed under the supervision of the mayor and engineer, and the cost apportioned among the property owners as required by the charter of the city. The board approved the estimates and apportionment, but the appellee, insisting that the ordinance is invalid, refuses to pay the assessment against him of $138.60.

The ordinance is alleged to be invalid because not in accordance with the provisions of the city charter.

Section 3449 of the Kentucky Statutes provides that the common council shall have power to pass ordinances to require the improvement of streets and alleys, subject to the mode and manner herein designated, either by grading and paving or by grading, paving and macadamizing at the cost of the owner or owners of the ground fronting such improvement, and the cost of such improvement to be apportioned according to the number of feet front each may own, etc.

Section 3450 provides that "upon the passage of any ordinance requiring the improvement of streets and alleys or parts thereof it shall be the duty of the mayor to enter into a contract with any person or persons offering or agreeing to do the work required to be done by such ordinance upon the best and most advantageous terms," etc.

The contention of appellee is that the ordinance is violative of the law, in that it requires *the lot owners* to construct the improvement in front of their respective lots, when the section quoted does not authorize the council to so require,

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but on the contrary provides that upon the passage of the ordinance the mayor shall enter into a contract with any person, etc.

The trial court seems to have been of that opinion. At any rate it sustained a demurrer to the petition seeking to enforce the lien provided by the statute upon the ground, as argued by appellee's counsel, that the ordinance was invalid because it did not conform to the sections quoted. We can not reach this conclusion.

It may be that the council may require the improvement to be done at the cost of the owner under the mayor's contract with some other person without affording the owner an opportunity of doing it himself, and we are inclined to think that the law admits such a construction. But it does not follow because such an opportunity is afforded by the ordinance that the owner can complain. Very serious complaint is often urged in cases of this kind because such an opportunity is not given, and with a better show of reason than where the owner is given a chance to do the work himself. Besides, the work here has in fact been done, and done under the mayor's contract with Noonan, after approval by the council, as required by the charter.

It is also argued by counsel that the ordinance does not "fully declare and prescribe the kind and extent of improvement to be made." (Section 3449.)

An inspection of the ordinance, however, shows a substantial compliance with this provision. In Hydes & Goose, &c. v. Joyes, 4 Bush, 264, a case relied on by counsel, the ordinance provided that certain sidewalks, "or such portions of said sidewalks as the city engineer may direct, be graded and paved at the costs of the owners of property binding thereon, said work to be done subject to the supervision and

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control of the city engineer," etc. And this court held it invalid because it was an attempted delegation of legislative power. The engineer might have determined, the court reasoned, to pave one portion with brick, one with stone and another with plank without transcending his authority, though such an ordinance could hardly have received any support in the legislative body of the city. Here the location of the streets to be improved, and the lots and parts of lots of the owners were sufficiently designated in the ordinance, and the sidewalks were to be of "brick and curbed with stone and provided with stone gutterways, the sidewalk to be eight feet wide from the line of the respective lots to the inside line of the curbing, and to be at the grade or elevation heretofore fixed by the city engineer and adopted by this board, and as shown and established by stakes already set in front of said respective lots or parts of lots."

We do not think the ordinance is invalid because the kind of stone and its thickness and width are not prescribed. Some of the details of this kind of work may properly be left to the city engineer without a violation of the law forbidding the delegation of legislative power.

In our opinion, therefore, the petition of the appellant states a good cause of action under the provisions of the statutes, and the demurrer ought to have been overruled.

Judgment reversed for proceedings consistent with this opinion.

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CASE 70—PETITION ORDINARY—JUNE 12.

Louisville & Nashville Railroad Company v. Offutt.

APPEAL FROM WARREN CIRCUIT COURT.

1. OPINION ON FORMER APPEAL—RES ADJUDICATA.—This court, on a second appeal in the same case, will treat the opinion of the Superior Court on the former appeal as the law of the case whether that opinion be erroneous or not; but it would not be proper for the court to follow such an opinion unless the law as therein held applies to the facts in the record on a second appeal.
2. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT.—A contract by a railroad company to give one employment as a freight conductor so long as he does "faithful and honest work," is indefinite as to the time of service, and terminable at any time by either party.
3. SAME.—In such contracts, when the term of service is left discretionary with either party, or when it is not definite as to time, or when it was for a definite time, provided both parties are satisfied—in either event either party has the right to terminate it at any time, and no cause therefor need be alleged or proved.
4. SAME.—A contract of employment which does not bind the employe to serve the employer either a definite or an indefinite time, may be terminated at any time by the employer, although he may have agreed to give the employe work as long as he did honest and faithful service—the essential element of mutuality of obligation being absent in such a contract.
5. VALIDITY OF CONTRACT—STATUTE OF FRAUDS.—An agreement by an employer to give the employe regular work so long as he does faithful and honest service is legal, and not against public policy; and such a parol agreement is not within the statute of frauds.

J. A. MITCHELL FOR APPELLANT.

1. The law is well settled that in all cases of indefinite employment as,

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for example, "so long as the servant may render faithful and honest service," as in this case, the contract is determinable at the will or option of either party, and the pleadings in this case not only admit the indefiniteness of the time, but also that appellant exercised its right to determine and did end the contract. (Wood's Master & Servant, Secs. 131, 133, 136; Harper v. Hassard, 113, Mass.; Coffin v. Landis, 46 Pa., 431; East Line & Red River Ry. Co. v. Scott, 72 Tex., 70, and 13 Amer. St. Rep., 758.)

2. The essential element of mutuality is entirely missing in the contract set up by the appellee, and it is therefore not enforceable.
3. The question now urged that the appellant had the right to terminate the contract at any time, was not directly nor indirectly passed upon nor referred to by the Superior Court in its opinion on a former appeal, and is therefore not *res adjudicata*. In the case of Adams' Express Co. v. Hoeing, 88 Ky., 373, this court merely held that it was concluded by the decision of the Superior Court on a former appeal, upon a question expressly considered and decided by that court.

H. W. BRUCE AND WILLIAM LINDSAY OF COUNSEL ON SAME SIDE.

EDWARD W. HINES FOR APPELLEE.

1. The question as to the right of appellant to terminate the contract at any time because the term was indefinite, was made by appellant's counsel on the appeal to the Superior Court, and the determination of that question urged by him; and in response to that the Superior Court in its opinion said: "Though the contract as alleged appears to be an extraordinary one, we see nothing in it which is illegal of itself, or which can be held to be against public policy."
2. If the appellant is liable in damages for breach of contract, as was clearly held by the Superior Court, it is certainly equivalent to deciding that appellant had no right to terminate the contract except for cause; and the decision of that court in the former appeal is the law of this case. (Adams' Express Co. v. Hoeing, 88 Ky., 373.)

SIMS & COVINGTON AND H. B. HINES OF COUNSEL ON SAME SIDE.

J. BARBOUR AND EDWARD W. HINES IN PETITION FOR RE-HEARING.

1. The phrase "employment for a definite term," does not necessarily mean an employment for a month or for a year or for a time ending at a fixed period, but includes an employment the continuance

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of which may depend upon contingencies—as, for example, for so long as the employe may be able to do the work for which he is engaged, or, as in this case, so long as he does faithful and honest work.

2. It is admitted by the pleadings that Stewart, Evans and Kelland, who made the contract with the appellee, had the authority of the company to make the contract.
3. The contract, as set up in the pleadings and shown by the evidence, has all the essential features of mutuality required in such contracts.
4. Every question presented on an appeal must be taken to have been disposed of by the decision on the appeal unless it be expressly left open for further litigation. (Smith v. Braemin, 79 Ky., 114; Williams v. Rogers, 14 Bush, 776.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The appellee, having been employed for a number of years as brakesman and freight conductor by the appellant on its road from Bowling Green, Kentucky, to Nashville, Tennessee, was discharged in the month of April or May, 1890, for violating some of the rules of the company.

Early in the month of July following there was a pending strike among the trainmen of the company at Wilder's Station, near Cincinnati, Ohio, when it became necessary for the company to procure men to take the place of the strikers, in order that it might be enabled to handle its freight traffic promptly. For this purpose one W. J. Stewart, who was at the time a "detective" or "special agent" in the employment of the company, was sent by Mr. Metcalfe, the general manager, to Bowling Green, and under special authority conferred upon him by the general manager proposed to hire the appellee to go to Wilder's and work for the company in moving its trains, which had been stopped by reason of the strike, offering him $5 per day and his expenses for the time he might be thus employed. The

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appellee accepted this special employment, went to Wilder's on transportation furnished him by the company, worked for the company for two or three days, returned to Bowling Green after the trouble with the strikers was settled, and was paid for the whole time he was absent, including the days of his actual service, making eight days in all, the sum of $40.

The appellee claims that at the time he accepted the employment for the special service referred to he asked Stewart that he might be restored to the position in the service of the company from which he had been discharged as above stated, and that Stewart then and there promised and contracted with him in substance that he should be restored to the position, and that he should keep it so long as he did faithful and honest work for the company. He claims that the same contract was made with him, also by G. E. Evans, who was the superintendent of transportation in the service of the company, and whom he met at Wilder's, and subsequently after the special employment was terminated by Mr. Kelland, who as the assistant general manager of the company. But each of these men denied in his testimony that he made any such bargain or contract with him, and it appears from the testimony of both Stewart and Evans that they had no authority to make any such contract for the company; that such authority did not appertain to the positions which they held, but that the employment of men for such regular service of the company was within the purview of the authority and duties of the division superintendents and their superior officers. But it appears from the evidence that the appellee was kept on the pay roll as freight conductor, with directions to wait until a place could be found for him, and that be-

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sides the $40 paid to him for said special service he received $46 as the balance of his pay for the month of July, and $80 for the month of August, and that on the 26th day of September, 1890, he received formal notice from the company that he would be allowed no more time, which was equivalent to a discharge from the service of the company.

This suit was brought by the appellee on the 11th day of October, 1890, to recover pay for the time, to the 26th day of September, for which he had received no pay, and the sum of $10,000 damages for breach of the alleged contract for regular or permanent employment. There is no controversy between the parties as to the special employment of the appellee by Stewart for service at Wilder's, or as to the pay he was to receive and did receive therefor. But the alleged contract for regular employment is stated in the petition to have been made at the time the contract for the special service was made, and is set forth in these words, viz: . . . And at said time the said defendant further agreed and promised and contracted with this plaintiff that when said strike was ended, and the regular trainmen returned to their work at said points, it would give to said plaintiff regular work as freight conductor on its road from Bowling Green, Kentucky, to Nashville, Tennessee, and would restore him to his old crew with which he had worked prior to his going to the State of Ohio, *and that said regular work would continue so long as this plaintiff did faithful and honest work for the defendant.*"

In an amended petition the same statement of the alleged contract was substantially made, with this addition, viz: "And that as his compensation for such work they would pay him at the rate of $95 per month, which said sum of $95 they agreed and promised to pay him monthly."

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The allegations of the petition and amendments were denied by the answer, and the issue thus made was tried before a jury in the court below in June, 1891, and upon a verdict in favor of the appellee for $575 a judgment was rendered, which was reversed on appeal to the Superior Court, and the case sent back for a new trial. The second trial resulted in a verdict and judgment against the appellant for $1,500, and the court having refused to grant a new trial that judgment on appeal is now before us for revision.

At the conclusion of the testimony the court on its own motion gave to the jury eight instructions which embodied the views held by the court as to the law of the case, all of which were excepted to by counsel for the appellant. Counsel for the appellant also made three requests for instructions which were refused by the court, and the action of the court in refusing the requests was duly excepted to. Error in thus giving and refusing instructions, and that the verdict was not sustained by sufficient evidence, and was contrary to law, were, with others, alleged as grounds for a new trial.

Counsel for the appellee in their brief rely mainly upon the opinion of the Superior Court, delivered in deciding the case on the former appeal, which, it is claimed, irrevocably settled the law of the case, and in attempting to apply the law as it was held by the Superior Court to the case as it is presented in the record before us, it is contended that the judgment must, therefore, be affirmed. Ordinarily it may be conceded the ruling of this court in such cases has been and should be according to this contention of counsel. (Adams Express Co. v. Hoeing, 88 Ky., 373.)

But we can not allow that it would be proper for us to follow the opinion of that learned court in any such case

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unless the law as therein held applies to the facts in the record before us on a second appeal. On the former appeal the Superior Court held that the contract alleged in the petition was not illegal or against public policy; that it was not within the statute of frauds, and that a discharged *employe for a fixed term*, who sues and whose case is tried before the expiration of his term of employment, can recover damages from his employer for discharging him only up to the date of the trial. These are undoubtedly correct principles of law, and that the first and second, as stated, unquestionably apply to this case as it appears in the record before us.

We can conceive of no reason for holding that a contract of employment or of service, either for a fixed term or for an indefinite time, would not be legal or would be against public policy. In actual experience such contracts are constantly made. And on both principle and authority such contracts must be held not to be within the statute of frauds and, therefore, may be made by parol. The third principle or rule is likewise well settled. But whether it applies to this case must be determined from this record. It is clear to us, after a careful examination of the evidence in the record, that the appellee failed to establish that a contract of any kind was made between the appellant and him, except for the temporary and special service that has been stated, and for which he received as he admits the sum of $40. Beyond this he failed either to allege or prove that he bound himself to serve the appellant, either for a definite or an indefinite time even conceding that the appellant promised to employ him as alleged in the petition. Upon his own showing the appellant had no right to make him answer in damages if he failed or refused to enter its service.

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It will thus be seen that the essential element of mutuality of obligation was omitted from the alleged contract of hiring, for the breach of which his suit was brought. In addition to this the evidence clearly shows that the two officers or employes of the appellant, Stewart and Evans, the "special agent" or "detective," and the superintendent of transportation in the service of the appellant, who, he alleged, promised him his old place in the service of the company, had no authority to bind the appellant by any such contract of hiring. And it is scarcely conceivable that the appellee, who had been in the service of the company, as he testified, for twelve or thirteen years, did not know that such employes of the appellant had no authority to employ its conductors for regular or permanent service, or that he was not aware that it was the custom of the appellant, which was shown by uncontradicted testimony, to employ conductors, brakemen, etc., without reference to any length of time of service, and subject to dismissal at any time and with the right on the part of such employes to leave the service at any time. Nevertheless, it further appears clearly from the testimony that the appellant, without being bound by contract so to do, placed the name of the appellee on its pay roll, with directions to him to wait until employment could be found for him, and that it expected and intended to furnish him employment, doubtless of the character of his former employment from which he had been discharged. Having done this, and having paid the appellee for a portion of the time of his waiting for work as if he were in actual employment, as he was directed or requested to do, the appellee had the right to expect payment for the whole time of his waiting up to the date on which he was notified of his discharge.

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But if it be conceded that there was a contract for regular employment, as alleged in the petition and amended petition, still the contract, as alleged and proved, being that "said regular work would continue so long as this plaintiff did faithful and honest work for the defendant," was a contract indefinite as to the time or term of employment or service, and was, therefore, subject to be terminated at any time at the discretion of either party to it. (L. & N. R. R. Co. v. Harvey, 34 S. W., Rep., 1069.)

The inevitable conclusion is that the principle or rule of law laid down in the opinion of the Superior Court as to the recovery of damages by an employe *for a fixed term* who has been discharged without cause by his employer has no application to the facts of this case as they are presented in the record.

The well-settled rule with reference to the character of hiring that is set up in the petition and amended petition is that when the term of service is left discretionary with either party, or when it is not definite as to time, or when it was for a definite time, provided both parties are satisfied, in either event either party has the right to terminate it at any time, and no cause therefor need be alleged or proved. (Wood on Master and Servant, second edition, sections 133 and 136; Am. & Eng. Ency. of Law, volume 14, pages 776, 790; L. & N. R. R. Co. v. Harvey, *supra*.)

In addition to the authorities here referred to the rule as stated is sustained by the cases referred to, and quoted in the brief of counsel for the appellant, the case of East Line & Red River Railway Co. v. Scott, 13 Am. St. Rep., 758, being an especially instructive case. In the view that we have taken of the case it is unnecessary to discuss the instructions given to the jury by the court. Being founded upon a

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theory of the law as applicable to the case radically different from our views, it follows that they were erroneous. Upon the case as it is presented in the record, the appellant had the right to terminate the relation between it and the appellee at will and without cause, and is not liable for damages for so doing. But the appellee had and has the right to reasonable pay for the time he waited for employment or work from the appellant up to the date on which he received notice of discharge, and the third instruction requested by counsel for the appellant on this point ought to have been given. This will entitle the appellee to reasonable pay for his time to the 26th day of September, 1890, deducting what he has received therefor from the appellant.

The judgment is reversed and the cause remanded, with directions to set aside the verdict and award the appellant a new trial, and for further proceedings consistent with this opinion.

CASE 71—PETITION ORDINARY—JUNE 12.

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Louisville & Nashville Railroad Company v. Hartwell.

APPEAL FROM HARDIN CIRCUIT COURT.

1. COMMON CARRIER—DELIVERY TO CONSIGNEE—PRESUMPTION OF OWNERSHIP.—When, after goods have been received by a carrier for transportation, and before their delivery to the consignee, the shipper gives it notice that they are not to be delivered to the

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consignee unless the bill of lading is presented by him and a draft for the price of the goods paid, and the goods are delivered to the consignee in violation of this order, the carrier is liable for the value of the goods; and after such notice the presumption no longer obtains that the consignee is the owner of the goods.

2. MEASURE OF DAMAGES.—The damages for such wrongful delivery in violation of the shipper's order, can not exceed the value of the goods.

3. GENERAL VERDICT—COURT NOT AUTHORIZED TO FIX AMOUNT OF RECOVERY—PRACTICE.—Where in a general verdict the jury merely finds for the plaintiff, without fixing any amount, and the recovery if anything must be money, the court is not authorized to fix the amount of the verdict and render judgment therefor. (Civil Code, Sec. 329.)

H. W. BRUCE, W. H. MARRIOTT AND WALKER D. HINES FOR APPELLANT.

No brief in the record.

R. S. STITH AND S. H. BUSH FOR APPELLEE.

No brief in the record.

WALKER D. HINES IN PETITION FOR MODIFICATION AND EXTENSION OF THE OPINION.

1. Upon delivery of goods to the carrier, the title either vests in the consignee or it does not; and if it does so vest, no subsequent notice by the consignor can change that fact. The only office of such notice would be to put the carrier on notice and require it at its peril to satisfy itself whether the title *did* vest in the consignee upon delivery to it.

2. As this case must be tried again, we ask the court to extend its opinion and decide whether or not the peremptory instruction should not have been given because there was a lack of evidence to show that Hartwell was the owner of the goods; whether the instructions were proper if the case was properly submitted to the jury, and whether the verdict was without evidence to support it.

3. The assignee of a bill of lading, even though a *bona fide* purchaser for value, gets no better title than his assignor had; and if

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Hartwell had no title to the apples on the 10th of September, 1892, he could transfer none to the bank. (Hutchinson on Carriers, Sec. 129; Benjamin on Sales, p. 1102, Sec. 1286; Porter on Bills of Lading, Sec. 438.)

4. The legal presumption is that the title to goods vests in the consignee as soon as the goods are delivered to the carrier; but this presumption is not conclusive and may be rebutted. (Smith v. Lewis, 3 B. M., 229; Hutchinson on Carriers, Sec. 135.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

On the 9th of September, 1892, Hartwell delivered to the appellant for shipment to A. Pennington & Co., of St. Louis, Mo., one hundred and seventy barrels of apples, for which he received from it a bill of lading. On the day following, Hartwell made a draft in favor of the First National Bank of Elizabethtown, Ky., on the consignee, A. Pennington & Co., for three hundred dollars and at the same time time delivered to it the bill of lading. He then notified the appellant not to deliver the apples to the consignee unless he presented the bill of lading and paid the draft which he had drawn in favor of the bank. In violation of Hartwell's order the appellant delivered to A. Pennington & Co. the apples without requiring them to present the bill of lading and pay the draft. The bank gave Hartwell credit for the draft, but Pennington & Co., failing to pay it, this action was brought to recover the amount of it of the appellant.

The answer denied that Hartwell was the owner of the apples and alleged that they were owned by Pennington & Co.

The shipper of goods may, even after the delivery to the carrier and after the bill of lading has been signed and delivered, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee, or some one for his use. However,

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this would not be the case if a state of facts existed which made the delivery of the goods to the carrier a delivery to the consignee and the owner of them. (Hutchinson on Carriers, 2d ed., sec. 134.)

While the consignee in the bill of lading is presumptively the owner of the goods and must be treated by the carrier as the owner, unless he has notice to the contrary, when goods are shipped deliverable to the order of the consignor, for and on account of the consignee, the carrier can not deliver them to such consignee, except upon the production of the bill of lading, properly rendered by the consignor.

When the goods are thus shipped and deliverable the carrier must take notice that the consignee intended to retain the control of the disposition of the goods. (Hutchinson on Carriers, sec. 130.)

So when the shipper gives notice after they have been received by the carrier for transportation and before they are delivered to the consignee, that he is not to deliver them to the consignee he must take notice that the consignor intends to retain control of their ultimate disposition. After such notice the presumption no longer obtains that the consignee is the owner of the goods.

Bills of lading are assignable. When properly rendered and delivered with the intention of passing the title to them, it is a constructive delivery of the goods. (Hutchinson on Carriers, sec. 129.)

In the same way they could be pledged to pay a debt and thus give the assignee control of the goods.

There was no proof as to the value of the apples. It was essential that such proof should have been made before there could be a verdict and judgment for the plaintiff. (Sub-section 126, Civil

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Code.) Unless they had a value the appellant could not have been damaged, except nominally on account of the appellant's delivery of the apples to Pennington Co. It can not be said because the draft was for three hundred dollars, therefore the apples were of equal value, and that there is an implied obligation on the part of railroad company to pay that amount. The company can only be made to pay the bank such damages as it sustained, not exceeding in amount the value of the apples, but in no event more than three hundred dollars.

Section 329, Civil Code, provides that "if, by a general verdict either party be entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery."

In this case the verdict must be general, and, if anything, the plaintiffs were entitled to recover money of the defendant.

The court failed to tell the jury that if they found for the plaintiff they should assess the amount of recovery, and the jury did not fix it.

The verdict is as follows: "We of the jury find for the plaintiff."

Although there had been proof as to damages the court was not authorized to render a judgment on the verdict, because the jury had failed to assess the amount of recovery.

The testimony of Grimes and Talbot in rebuttal should have been given in chief.

The judgment is reversed for further proceedings in conformity with this opinion.

The following response was delivered to the petition for a modification and extension of the opinion, *per curiam*.

The only question in this case, under the pleadings and

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proof, is as to who owned the apples when they were delivered to the carrier.

There is no evidence tending to show that Hartwell had any authority as the agent of Pennington & Co. to draw the draft. In fact, the theory of the bank is that Hartwell bought the apples on his own account, and it furnished the money to pay for them.

It follows that instruction No. 4 should not have been given.

CASE 72—PETITION ORDINARY—JUNE 13.

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American Accident Company of Louisville v. Carson.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. ACCIDENT INSURANCE—EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.—Under an accident policy insuring one against injuries effected through "external, violent and accidental means," if, as to the person injured, the injury was unforeseen, unexpected, not brought about through his agency, designedly, or was without his foresight, or was a casualty or mishap not intended to befall him, then the occurrence is accidental, and the injury one inflicted by accidental means within the meaning of the policy.
2. SAME.—Where such a policy insures against death or injury by "external, violent and accidental means," and there is a provision that it shall not "extend to or cover intentional injuries inflicted by the insured or any other person," the exception refers only to non-fatal injuries so inflicted.
3. ACCIDENT INSURANCE—PLEADING.—When an accident policy provides that if the insured is injured or killed in any occupation or

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exposure, classed by the company as more hazardous than that recited in the application, the insured or his beneficiary is only to get a reduced sum, in an action by the beneficiary on the policy for the full amount thereof, he must allege that the insured was not killed while engaged in an occupation more hazardous than that stated in the application.

O'NEAL, PHELPS, PRYOR & SELLIGMAN AND BULLITT & SHEILD FOR APPELLANT.

No brief in the record.

R. C. WARREN, M. C. SAUFLEY AND W. G. WELCH FOR APPELLEE.

1. In the absence in this court of the evidence introduced in the lower court by the appellant to sustain its defense, the presumption must prevail that the peremptory instruction to find for plaintiff in the lower court was proper.
2. Where one, by the act of another, received an injury which he has no agency in bringing on himself, and which was not foreseen by him, from which death results, it is a death through external, violent and accidental means. (Hutchcraft's Ex'or v. Traveler's Ins. Co., 87 Ky., 300; Amer. Accident Co. v. Reigart, decided in 1893.)
3. The condition that "this insurance does not extend to or cover intentional injuries inflicted by the insured or any other person" refers wholly and only to injuries which do not result in death. The language used in the policy under consideration in the Hutchcraft case was "death or injury," while in this case it is only "injuries."
4. When an agent, authorized by his company to take applications for insurance, without the knowledge of the applicant, writes false answers, or fails to write the whole truth as stated by the applicant, the company will be estopped by the answers thus written by its agent, and the knowledge of the agent will be treated as the knowledge of the company. (Rowley v. Emp. Ins. Co., 36 N. J., 550; Plumb v. Cattaraugus Co. M. Ins. Co., 18 N. Y., 392; Ins. Co. v. Wilkerson, 13 Wall, 222; New Jersey M. L. Ins. Co., v. Baker, 94 U. S., 610; May on Insurance, sec. 143, page 161; Hartford Ins. Co. v. Haas, 87 Ky., 538; Mutual Benefit Life Ins. Co. v. Daviess' Exor., 87 Ky., 548; Hartford Life & Annuity Ins. Co. v. Hayden's Admr., Ky. Law Rep. of June, 1890; Wright's Admr. v. N. W. Mutual Life Ins. Co., Ky. Law Rep of May, 1891.)

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D. W. SANDERS OF COUNSEL ON SAME SIDE.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In April, 1891, the appellant company, in consideration of certain agreements, statements and warranties made in the application of one Stephen M. Carson, and the sum of seven dollars issued to him under "division A," wherein Carson's occupation was described as that of a druggist, a policy of insurance, known as an "accident policy," by which, for the term of three months, the applicant was insured against bodily injuries effected through "external, violent, and accidental means," (1) which wholly disabled him; 2) such injuries as partially disabled him; (3) such as resulted in the loss of an eye; (4) loss of a hand or foot, and lastly loss of both hands or feet, etc., in which event the full principal sum of five thousand dollars was to be paid to the insured, if he survived, or if he died then to his father A. Carson, the appellee here.

In the body of the policy it was provided that if the insured was injured or killed in any occupation or exposure classed by the company as more hazardous than that recited in the application, the insured or his beneficiary should be entitled to only such sums as are named in the division so classed as more hazardous. And on the back of the policy, among many other conditions under which the policy was issued we find the following: "This insurance does not cover disappearances nor suicide while sane or insane, nor injuries, whether fatal or otherwise, of which there is no visible mark upon the body, nor accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, . . . nor extend to or cover intentional injuries inflicted by the insured or any other person or in-

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jury or death happening while the insured is insane or under the influence of intoxicating drinks or narcotics," etc.

It appears that the insured met his death in May, 1891, and under circumstances to be presently considered. The company denying any liability, the beneficiary, A. Carson, brought this action in the Jefferson Circuit Court for the principal sum indicated in the policy, and upon peremptory instructions, at the conclusion of the testimony, a verdict was rendered in his favor. From the judgment thereon the company appeals.

After certain preliminary statements the petition avers that "on the 8th day of May, 1891, and before the said term of insurance had expired, the said Stewart M. Carson was shot through the body by a ball from a gun or pistol, and thereby instantly and intentionally killed by one Jesse Burton, in the vicinity of Branford, in the county of said Carson's residence, in the State of Florida;" that "the said shooting and killing by the said Jesse Burton was not done in a mutual affray, was not provoked by any misconduct on the part of said Carson, and was not foreseen by him in time to have been avoided, but was wanton, causeless, unprovoked and unexpected by him."

It is evident, and it is so argued, that the pleader's object in setting out the fact that the insured came to his death by a shot fired through his body intentionally by another, thus anticipating the probable defense, was to provoke a demurrer, and thus present fairly to the court for construction the meaning of the words, "nor extend to or cover intentional injuries, inflicted by the insured or any other person," found on the back of the policy, and, therefore, not necessary to be adverted to in declaring on the contract. The expected demurrer was filed and overruled, and thus is presented for

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our consideration two questions: First, were the "means" producing the death of the insured "external, violent and accidental?" And second, was the death of the insured "an intentional injury inflicted by another" within the meaning of the policy.

On the first point little need be said. While our preconceived notions of the term "accident" would hardly lead us to speak of the intentional killing of a person as an "accidental" killing, yet no doubt can now remain, in view of the precedents established by all the courts that the word "intentional" refers alone to the person inflicting the injury, and if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means within the meaning of such policies.

Thus where one was waylaid and assassinated for the purpose of robbery his death was held to have been caused through "external, violent, and accidental means." Hutchcraft's ex'or v. Traveler's Ins. Co., 87 Ky., 300.)

So death by hanging at the hands of a mob was held to be an accident within the meaning of a policy against injuries through "external, violent and accidental means." (Fidelity & Casualty Co. v. Johnson, 30 L. R. A., 206, — Miss.)

So the death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by accident and "not a risk voluntarily assumed, where he makes the attempt without knowing that the other person is armed." (Lovelace v. Traveler's Protective Association. 126 Mo., 104.)

See also numerous authorities to the same effect in notes to case last cited in 30 L. R. A., 207.

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In the Hutchcraft case, however, and in others cited, a recovery was denied, because while the killings were accidental within the meaning of the words, "external, violent and accidental," as used on the face of the policy, yet certain conditions or provisos protected the company against loss where "the death or injury may have been caused by intentional injuries inflicted by the insured or any other person."

And a consideration of this feature brings us to the second question presented by the demurrer.

In the cases to which our attention has been called, involving accident policies in many different companies, it is noticeable in all that the form of the usual protecting proviso against loss from "intentional injuries" is somewhat different from the corresponding clause in the policy before us. The clause in the Hutchcraft case—Traveler's Ins. Co.—will illustrate this. It is as follows: "And no claim shall be made under this ticket, when the *death* or *injury* may have been caused . . .by intentional injuries inflicted by the insured or any other person."

This is not merely protection against *injuries* so inflicted but against *death* as well. In express terms that policy excepts *death* from intentional injuries inflicted by any other person, and does not content itself with providing merely that no claim shall be made when the *injury* may have been intentionally inflicted. The language is "death or injury," and the policy protects against either death or injury when caused by intentional injuries inflicted by the insured or any other person. In the present case, as we have seen, the policy is not to extend to or cover intentional *injuries* inflicted by the insured or any other person. Here we find a difference between the policy under consideration and all others we have examined. The words "death or injury" are used

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in all of them, and, indeed, in this policy we find those words separated for the first time in the clause under discussion. We find it provided in the preceding clause that the policy does not cover acidental *injuries or death*, resulting from hernia, etc., and immediately succeeding the clause in dispute the language is, "or injury or death happening while the insured is insane," etc. We notice, too, that the policy is not to cover injuries *whether fatal or otherwise*, of which there are no visible marks upon the body, and it appears well settled that this exception, without the words "fatal or otherwise," has reference only to cases of bodily injury which do not result fatally—that is, the word "injury" is used in its usual sense as implying a hurt not resulting in death. (McGlinchey v. Fidelity, &c., Co., 80 Me., 251.)

The words "injury or death," and "injured or killed," are used in this policy some eight times or more, and seemingly in sharp contrast, and the significant omission of the word "death" in this particular clause requires us to hold that the exception referred only to non-fatal injuries intentionally inflicted by the insured or any other person.

We conclude, therefore, that the petition stated a good cause of action so far as the points discussed are concerned. It is insisted, however, that as the plaintiff sued for the full principal sum of five thousand dollars he ought to have negatived the conditions stated in the face of the policy under which, if they existed, that sum must have been reduced and the policy scaled.

The insured agreed that if he was killed in any occupation or exposure classed by the company as more hazardous than that of druggist his beneficiary was to get only a reduced sum, and it seems evident that his beneficiary must allege, if he can truthfully do so, that the insured was not so killed.

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else the court could not render judgment for the sum to which the policy under its terms entitled him.

The policy was made part of the petition and forms the basis of the action. The claimant must bring himself within its terms and conditions as stated on its very face.

It can not be said that this should come from his adversary. Whether the insured was engaged at the time of his death in a more hazardous occupation or exposure than that of a druggist was peculiarly within the knowledge of the insured and his beneficiary, who must be held to a general knowledge of the divisions and classifications of risks, and to have acted intelligently in accepting insurance in "division A."

Of course if the true issue is in fact made, it does not matter from whom the exceptional matter comes, and it is true that the company pleaded that the insured was killed while acting as deputy sheriff, and attempted to plead that he was insured as a druggist or dealer and not otherwise, but just what its pleas would have been, had the plaintiff been required to set up its cause of action according to the terms of the contract, we do not know, and, convinced of this error occurring at the inception of the proceedings, no other questions need be considered.

Judgment reversed for further proceedings consistent with this opinion.

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CASE 73—PETITIONS EQUITY—JUNE 13.

Todd, Mayor, v. Dunlap et al. Same v. Tilford et al.

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APPEALS FROM JEFFERSON CIRCUIT COURT, THE FIRST NAMED FROM THE LAW AND EQUITY DIVISION AND THE OTHER FROM THE COMMON PLEAS DIVISION.

1. MUNICIPAL OFFICERS—REMOVAL OF BY MAYOR AND BOARD OF ALDERMEN.—The provision of section 160 of the Constitution of Kentucky that the General Assembly "shall prescribe the qualifications of all officers of towns and cities, the manner in and cause for which they may be removed from office," applies to all offices of towns and cities, whether created by the Constitution or the Legislature; and the Legislature, having fixed by the charter of cities of the first class (Sec. 2781, Ky. Stats.), the manner in which the officers of such cities may be removed, but failing to prescribe the cause for which it may be done, such cause must be such as constitutes misfeasance or malfeasance in office, or that character of charge which renders the officer unfit for the position; and the members of the Boards of Public Works and Public Safety, who are appointed for a definite term and at a fixed salary, can not be removed by the mayor or the Board of Aldermen, except for cause, and after notice and an opportunity to be heard.

2. SAME.—The provision in the charter of cities of the first class (Sec. 2794, Kentucky Stats.), giving the mayor the right "by a written order, giving his reasons therefor, to remove from office, any head of department, director, or other officer appointed by him," does not authorize the arbitrary removal of officers appointed for definite terms and at fixed salaries, without notice and opportunity to be heard. Such a construction would give to the mayor an arbitrary power to remove without a trial and without opportunity to be heard, these important municipal

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officers—a thing never intended by the Legislature and in direct antagonism to the whole policy of the State.

A. BARNETT FOR APPELLANT.

1. The statute gives the mayor the right "by a written order, giving his reasons therefor, to remove from office any head of a department, director or other officer appointed by him," and under that he has the absolute right to remove the appellees for any reason that is satisfactory to himself and approved by the Board of Aldermen. (South v. Commissioners, 86 Ky., 187.)
2. Section 160 of the Constitution, which provides that the General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and cause for which they may be removed from office" applies only to offices created by the Constitution, and not to offices of legislative creation; and the appellees are in no wise affected by its provisions. (Smith on contracts; Parsons on Contracts, 6th ed., vol. 2, p. 501, note v; Bishop on Contracts, sec. 595; Pollock's Contracts, 409; Jarman on Wills, vol. 2, 395; Sedgwick on Construction of Law, 361; Wharton on Contracts; Story on Contracts, sec. 786; Waite's Actions and Defenses, vol. 1, p. 125; Kennedy v. Foster's ex'or, 14 Bush, 479; Bishop on Written Laws, sec. 245; Simons v. Johnson, 3 B. & Ad., 23, E. C. L. R., 175; State v. Marshall, 13 Tex., 55; Tarrance v. McDougall, 12 Ga., 526; Vaughan v. Porter, 16 Vt., 266; McDade v. People, 29 Mich., 52; Brooks v. Cook, 44 Mich., 617; People v. N. Y. & M. B. R. Co., 84 N. Y., 565; *In Re* Hermance 71 N. Y., 487; City of St. Louis v. Laughlin, 49 Mo., 559; Littlefield v. Winslow, 19 Me., 394; Grumler v. Webb, 44 Mo., 444; Pordus Appeal, 100 Pa. St., 408; White v. Ivy, 34 Ga., 186; McIntyre v. Ingram, 35 Mass., 25; U. S. v. Irwin, 5 McLean, 179; Chapman v. Forsythe, 2 How., 208; Black v. Delaware & Raritan Canal Co., 9 C. E. Green, 455; Lewis v. Smith, 9 N. Y., 502; Hawkins v. Great Western R. Co., 17 Mich., 57; Page v. Hardin, 8 B. M., 656.)

D. W. FAIRLEIGH, JOHN MARSHALL AND H. S. BARKER ON SAME SIDE.

1. It is apparent from the whole charter for cities of the first class that the mayor was to be given absolute power over the executive boards at all times, as he was responsible for their appointment, and answerable to the people, who elected him, for the proper administration of their various duties.

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2. It is well established that as to officers not constitutional, but wholly the creatures of statute, the legislature has plenary power to provide their qualifications and the manner of their removal, be the removal with or without cause, with or without notice and hearing. (South v. Commissioners, 86 Ky., 186.)
3. Because there must be a *cause of removal*, there is not necessarily a limitation upon the *power* of removal. The *cause* intended may be only such as is satisfactory to the party exercising the power. (City of Hoboken v. Gear, 3 Dutcher (N. J.), 265.)
4. Where the law authorizes the mayor to remove municipal officers, his judgment is final and conclusive, and can not be inquired into by the courts in the absence of a provision of the law authorizing such inquiry. (Throop on Public Officers, sec. 396; People v. Stout, 19 How., Pr. (N. Y.), 171; People v. Barfield, 35 Barb. (N. Y.), 254; Patton v. Vaughan, 39 Ark., 211; U. S. v. Oliver, 6 Mackey (D. C.), 47; Oliver v. Americus, 69 Ga., 165; State v. Ramos, 10 L. A. Ann., 420; State v. Doherty, 25 La. Ann., 119; Hamtrack v. Holihan, 46 Mich., 127; Hoboken v. Gear, 27 N. J. L., 265; State v. Hawkins, 44 O. St., 98.)

PIRTLE & TRABUE AND HUMPHREY & DAVIE FOR APPELLEES.

1. If section 32 of the city charter (Ky. Stat., sec. 2794) be construed as authorizing the mayor to remove the members of the boards of public works and public safety without cause, hearing, or trial before a duly authorized tribunal, with judicial powers to try such officers, then it violates section 160 of the new Constitution, and is void. (Kentucky Constitution, sec. 160; Kentucky Statutes, secs. 2794, 2784, 2802, 2861, 2824; Dillon on Municipal Corporations, 4th ed., secs 240, 250, 255; Mechem on Public Officers, secs. 445, 455; Hallgren v. Campbell, 21 Amer. State R., 555 (82 Mich., 255); Speed v. Council of Detroit, 97 Mich., 198 (56 Northwestern, 570); Lease v. Freeborn, 53 Kansas, 750 (35 Pac. R., 817); Amer. and Eng. Ency. Law, vol. 19, p. 562f; Collins v. Tracy, 36 Tex., 546; Rex v. Richardson, 1 Burrows, 517; "James Baggs' Case," 11 Coke's Rep., 98; Field v. Comm., 32 Pa. St., 485; State v. Police Commrs., 14 Mo., Apps., 306; State v. Smith, 35 Neb., 33 (52 N. W., 700); Speed v. Detroit, 39 Amer. St. R., 563 (98 Mich., 371); People v. Jewett, 6 Cal., 291; State v. Chatburn, 50 Amer. Rep., 760 (63 Ia., 659); Williams v. Commonwealth, 79 Ky., 42, 47; Cooley's Const. Lim., 6th ed., p. 78; Lowe v. Comm., 3 Met. (Ky.), 241; Brown v Grover, 6 Bush, 1; Page v. Hardin, 8 B. Mon., 661, 672, 677; Dallam v. Wilson, 53 Mich., 392 (51 Amer. Reps., 128); Lease v. Freeborn, 52 Kansas, 750 (35 Pac., 818);

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State v. Walbridge, 41 Am. St. R., 670 (119 Mo., 383); State v. Duluth, 39 Am. St. R., 598 (53 Minn., 238); People v. Fire Commrs., 72 N. Y., 455; State v. Brown, 57 Mo. Apps., 199.)

2. Said section 32 (Ky. Stats., sec. 2794), (authorizing the mayor arbitrarily, causelessly, and without trial, to remove certain officers), properly construed, does not apply to these higher executive boards. (Ky. Stats., secs. 2793, 2794, 2784. 2802, 2861, 2898, 2801, 2861, 2810, 2865, 2866, 2825, 2897, 2898, 2815. 2816, 2823, 2807, 2804, 2781, 2789, 2788; Burnett's City Code of 1884, p. 325, sec. 41; Hallgren v. Campbell, 21 Amer. St. R., 561 (82 Mich., 255); Jacques v. Little, 51 Kansas., 300 (33 Pac., 107); State v. Chatburn, 50 Amer. Reps., 760 (63 Ia., 659); Page v. Hardin, 8 B. Mon., 672, 677; Dallam v. Wilson, 51 Amer. Reps., 128; Metsker v. Nealy, 13 Amer. St. Rep., 269 (41 Kansas, 122); Barbour v. City of Louisville, 83 Ky., 100; Endlich on Interpretation of Statutes, sec. 412; Bishop on Written Laws, sec. 246b; People v. McAllister, 37 Pac. Rep., 581 (10 Utah, 357); Sedgwick on Statutory Construction, p. 361; Keenan v. Goodwin, 17 Rhode Island, 649; Jackson v. People, 77 Amer. Dec., 491; Speed v. Council, 97 Mich., 198 (56 N. W., 574.)

CHIEF-JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The board of public safety and the board of public works, executive boards of the government of the city of Louisville, instituted these actions in equity in the court below, in which it is alleged the mayor and board of aldermen were about to remove the members constituting the two boards from office without cause, and the sole question in each case is: "Has the mayor the power, with the approval of the board of aldermen, to remove these officials without notice and trial, and without assigning any cause for their action?"

The judge of the law and equity court decided the one case, and the judge of the common pleas court the other, each holding the mayor had no such power.

These executive boards, composed of three members each, are appointed by the mayor, with the approval of the aldermen, for a term of four years, with a salary each of not less than $2,500. The board of public works are invested with

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the control of all the public ways of the city—the construction of streets and their reconstruction; the supervision of the public buildings; the lighting of public places, with the power of contracting with reference to such matters, and in fact with powers unlimited in this regard, subject to the supervision of the mayor, and when not in conflict with the organic law of the city.

To the board of public safety is given the exclusive control, under the ordinances of the council, of the fire department, the police department, the health department, the department of building, of all the charitable, reformatory and penal institutions of the city, with many other powers given by statute, investing the two boards with the execution and control of nearly all the departments of the city government, and to carry into effect the legislation of the municipality.

They are the creatures of the legislature, and their terms of office, as is contended, may be ended at the legislative will. They have neither a freehold in their offices nor a vested right that places their official existence beyond legislative control, yet they are officers of the city, with a responsibility and duty resting upon them that renders their position as important as any other in the conduct of the municipal government.

Section 160 of the State Constitution is as follows: "The mayor or chief executive, police judges, members of city councils of towns and cities, shall be elected by the qualified voters thereof, provided the mayor or chief executive and police judges of towns of the fourth, fifth and sixth classes may be appointed or elected, as provided by law. The terms of office of mayor or chief executive or police judges shall be four years, and until their successors be qualified, and of members of legislative boards two years.

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When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof shall reside in each of said wards or districts; but when in any city of the first, second or third class, where there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city, but officers of towns and cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may by a general law provide; but when elected by the voters of a town or city their terms of office shall be four years, and until their successors shall be qualified. No mayor or chief executive or fiscal officer of any city of the first class, after the expiration of the term of office to which he has been elected under this Constitution, shall be eligible for the succeeding term. Fiscal officers shall not include auditor or assessor, or any other officer whose duty is not the collection of or holding of public moneys. The General Assembly shall prescribe the qualifications of all officers of towns and cities, *the manner in and cause for which they may be removed from office*, and how vacancies in such offices shall be filled."

It is claimed by counsel for the two boards that under this provision of the Constitution the Legislature must prescribe the manner in and the cause for which city officials may be removed, and the legislature having failed to comply with the Constitution in this regard the common-law rule must prevail, and the party sought to be removed is, therefore, entitled to notice of the charges against him and to a hearing in his defense, and by the appellant (the mayor) it is insisted this provision of the Constitution does not embrace or affect any officer of a town or city except those especi-

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ally mentioned in that section, and its operation confined to the officers therein named.

It must be readily seen by a casual reading of this section that many of the most important offices connected with a city government, and indispensable to its existence, are omitted to be mentioned in the section of the Constitution referred to, and the creation of such offices confided by that instrument to the wisdom of the legislative branch of the government, with the duty of prescribing their qualifications, and the cause or causes for which they may be removed.

The mayor, police judges and members of legislative councils of cities of the first, second and third classes must be elected by the people, and like officers of towns and cities of inferior classes may be appointed or elected as provided by law; and in the same section, after defining the mode in which these constitutional officers are to be chosen, and knowing that other officers must of necessity be created, further provided: "But other officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may by a general law, provide; but when elected by the voters * * * their terms of office shall be four years, and until their successors are qualified," and concluding the section by vesting in the legislature the power to prescribe the qualifications of all officers of towns and cities, the *manner in and cause for which they may be removed from office*, the provision evidently applying to all officers of towns and cities, whether created by the Constitution or the legislature, and in carrying into effect this provision of the Constitution in regard to removal from office the General Assembly enacted, under the title of Municipal Corporations, the following:

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"Section 2781. Executive and ministerial officers, unless otherwise provided in this act, shall be removable by the board of aldermen, sitting as a court, under oath or affirmation, upon charges preferred by the board of councilmen. No person so charged shall be removed from office without the concurrence of two-thirds of the aldermen, and when a person has been so removed from office he shall be ineligible thereto during the term for which he has been elected."

This provision of the statute is sufficiently comprehensive to embrace every city officer; and, although the charges for which the removal may be made are not specified, they must be such as constitute misfeasance or malfeasance in office, or that character of charge that renders the officer unfit for the position.

The contention of the appellant is that by a subsequent section of the statute on municipal corporations the manner of removing the members of these two boards has been *otherwise provided by law*. That section reads: "He (the mayor) may, by a written order *giving his reasons therefor*, remove from office any head of department, director or other officers appointed by him. A copy of said order shall be sent to the board of aldermen at its next meeting. Unless such order be disapproved by the board of aldermen within thirty days said order shall stand." (Section 2794.)

These officials having been appointed by the mayor, it is urged in his behalf that any reason satisfactory to himself, and approved by the board of aldermen, is a compliance with the statute, and that no limitation on this power of removal exists when applied to those officers holding under his appointment, and however competent and faithful they may be in the discharge of their duties, their positions are held at the mere will of the chief executive.

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Counsel for the appellees maintain they are not heads of departments or such appointees of the mayor as are embraced by section 2794.

That they are placed on a level with the mayor in regard to executive duties, and while they are subordinate in some particulars to the mayor, their executive powers are greater than his.

While conceding the force of the arguments, we are disposed to determine this issue on other grounds, and, for the purpose of this case, will assume they come within its provisions.

The case of South v. Sinking Fund Commissioners, 86 Ky., 186, is relied on as sustaining the power of the mayor in the present case. In that case it will be found the statute in express terms placed the power of removal *within the discretion* of the commissioners. It provided: "The said commissioners shall *have power at their discretion* to remove any warden unless the General Assembly should refuse to concur in their action, etc." No reasons for removal were required to be given, nor was there any constitutional prohibition to the removal without cause.

In the absence of a constitutional inhibition an office created by the legislature in a municipality might, by the terms of the act creating it, vest the power in the mayor to remove without cause, leaving the reasons for the removal within his own breast. This is not denied.

Mechem, in his work on Public Offices, says: "Where, therefore, the term of office *is not fixed by law*, and no other provision is made for removal, either by Constitution or statute, it is said to be a sound and necessary rule to consider the power of removal as incident to the power of appointment, but this power of removal is limited to these cir-

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cumstances; and if the term is fixed by law, or if the officer is appointed to hold during the pleasure of some other officer or board than that appointing him, the appointing power can not arbitrarily remove him." And it might be said that where the term is fixed the power to remove at will might be added, for, in the absence of any constitutional prohibition, the power of the legislature in this regard is not to be restricted.

Our attention has been called to the case of The People v. Stevenson & Higgins, 15 Ills., 110, as sustaining the contention of the appellant. In that case the act created the Illinois Hospital for the Insane, and authorized the trustees to appoint a medical superintendent, subject to removal only *for infidelity to the trust reposed in him.* There was no mode of proceeding in such cases provided by the Illinois statute, and the trustees, being satisfied of the incompetency of the appointee, removed him without notice or trial. It was held that this power was with the trustees, and the opinion based principally on the ground of the necessity for prompt action on the part of the trustees, the court saying: "Circumstances may require, and even the very existence of the institution may demand the most prompt and energetic action on the part of the trustees in the removal of the superintendent, and the law did not design to leave them powerless to act in such an emergency; and the law being silent as to the manner of proceeding, the nature of the case must determine what course of justice the trustees should pursue in exercising the power of removal."

That case can be easily distinguished from the case before us; but even in such case, in a well-considered case of Lease v. Freeborn, 52 Kansas, 750, a different rule prevailed. The plaintiff in that case, Mary Lease, was a member of the

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State Board of Charities, and was removed without cause, or at least without notice or trial. The Constitution of Kansas provided: "The term of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment."

A statute of that State subsequently passed declared that the terms of office of the trustees should be three years. The statute was silent as to any cause of removal, notice or trial, and the court held: "The mere silence of the statute, with respect to notice and hearing, will not justify the removal of an officer, whose term is declared by law, without knowledge of the charges, and an opportunity to explain his or her conduct, and defend his or her course and character."

It is urged, however, in this case that the cause of removal (the statute being silent on the subject) is with the mayor and the board of aldermen, and no court can supervise their action.

That the Constitution having required the Legislature to prescribe the causes, and that body having failed to comply with its provisions, the power of removal becomes discretionary with the mayor and board, and the cases of The People v. Stout, 19 Howard (N. Y.), 171; the Mayor and Council of Hoboken v. Gear, 27 N. J. Law, 265, and People v. Whitlock, 92 N. Y., 191, as well as other cases, are referred to as sustaining this view.

It was held in the case of The People v. Stout that the exercise of such a power (removal for cause)) "is judicial in its nature, and, therefore, not the subject of review by any other tribunal, either in respect to the cause, its sufficiency or existence in any respect whatever."

In the case of The Mayor v. Gear it was held that although

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the appointment to the office was a *fixed term* and the removal for cause, it meant only such cause as was satisfactory to the council.

Other cases follow the authorities referred to, some of them holding (and to which we assent) that the legislature when not forbidden by the organic law, having been given the authority to create an office for a term, may, if in express terms, authorize the removal of the incumbent without notice or hearing.

In looking to the doctrine on the question of the *removal* from office found in the elementary books, as well as the weight of authority in the adjudged cases, we are not disposed to recognize the rule contended for by the appellant in the construction of our State Constitution or the statute creating municipal offices. The general power to remove an officer who holds for a definite term carries with it the power to remove for cause upon notice and trial, and it is only in cases where this power to remove without a trial is expressly given that it can be exercised. This doctrine is elementary, and sustained by the decided weight of modern authority.

In the case of The State *ex rel* v. Dennison, 90 Mo., 19, a police justice had been appointed by the council, and confirmed by the mayor, for the term of four years. The validity of his removal was tested. The charter was silent as to notice and trial where one had been appointed to office, but it did require a notice and hearing to those who had been elected to office.

It was contended that inasmuch as the charter required notice to elective offices before removal, it must negative the idea that any notice was required to be given appointed officers. The court held that no inference dispensing with notice arose from the failure of the charter to require it; and

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further, that the removal of the justice without an opportunity to be heard was invalid. (State v. Brown, 57 Mo., 179.)

In the case of Halgreen v. Campbell, 82 Mich., 255, the charter of the city of Menominee prohibited, in express terms, the removal of elective officers except for cause, and it was argued in that case the presumption must follow the legislature intended that appointed officers should be removed without cause, or at the pleasure of the appointing power, but the court held that no such presumption would be indulged to enable those in power to exercise such arbitrary power, and the appointee was entitled to be heard.

In the case of Speed v. Common Council of Detroit the office of city councillor was filled by appointment from the mayor for a fixed term, and the charter of that city provided: "Any officer holding office by appointment, *unless otherwise provided by law or ordinance*, may be removed at any time by the council without charges and a trial thereof, by a vote of a majority of the members-elect, except the comptroller, receiver of taxes, etc." The appointee was not within the exception. The court held that such power was inconsistent with the power of appointment by the mayor for a fixed term, and, therefore, the removal was invalid, the officer being entitled to notice and an opportunity to be heard.

The court in that case referred to the case of *ex parte* Hennen, 3 Pet., 230, in which it is said: "We have not found any case where an officer who was appointed for a fixed term, and where the power of removal was not expressly declared by law to be discretionary, has been held to be removable except for cause;" and when cause is to be assigned the party is entitled to an opportunity to be heard.

But it is further contended that the legislature, by sec-

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tion 2794 of the Kentucky Statutes, applying to the cities of the first class, has given the express power of removal without cause, and for any reason the mayor might suggest, if approved by the board of aldermen. We can not assume that this is the legislative meaning of that section, or that such a construction should be given it, or that the exercise of such an arbitrary power arises by implication.

The members of these executive boards carry into execution nearly the entire legislation of the municipal government, and are entrusted with the performance of duties requiring the exercise of the highest judgment and the assumption of grave responsibilities. They are appointed for the fixed term of four years, with a salary commensurate with the duties they are to discharge, and to concede the power of the mayor to expel these boards from office with or without cause, in the absence of a trial or an opportunity to be heard, would be to recognize the existence of an arbitrary power that never entered the mind of the legislature, and in direct antagonism with the entire policy of the State in reference to such officials.

The legislature, in failing to comply with the provision of the Constitution, in not assigning causes for removal of city officials, attempted to transfer the exercise of this legislative power to the mayor, and left with that officer and the board of aldermen the right of determining *the reasons* for which the members of these boards should be removed, and if such a power could be delegated (and we think it could not) a removal *for reasons given* must be based on some neglect of duty or the want of capacity to conduct the office, or such other causes as unfit the member for holding the place.

If the legislative purpose had been to give the power to

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the mayor to remove at pleasure, with no constitutional provision against its exercise, they would have said so, for in sections of the same general act the power to remove at pleasure is given in express terms, and when empowering the mayor to remove for *reasons given* the legislative meaning was a removal *for cause*—for legal reasons, based on a sufficient cause—and when removed for *reasons given* or for cause the party is entitled to a hearing, and to be proceeded against as provided in section 2781 of the chapter on Municipal Corporations.

The act also under which this power is claimed plainly indicates the legislative policy as to the removal of the city officials, and goes so far as to require the board of safety, when investigating charges against the members of the police force, its own appointees, to give *reasonable notice* to the accused, that he may be heard; and yet it is attempted to be maintained that these executive officers, because they were appointed by the mayor, can be removed for any cause, however trivial, or for charges odious and degrading without the opportunity of making defense and of disproving the charges made.

We can not assent to the exercise of such a power, and the necessity for some stability, and independence in the discharge of the important trusts confided to these executive boards is of itself a convincing argument against the contention of the appellant, and aids much in the construction of the statute from which it is argued this arbitrary power flows.

In the case of Mindy v. Board of Fire Commissioners of the City of New York, the charter of that city declared that "the power of removal by the commissioners could not be exercised as to any regular clerk until he has been informed of the cause of the proposed removal."

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The clerk was removed after notice, and without cause, and then a second notice given, and the cause assigned was that "the duties of the position could be better performed by some one else." It was held the provision of the charter necessarily implies the cause of removal must be for some neglect of duty or some delinquency affecting the general character of the one sought to be removed, and that some other person *could more* efficiently perform the duties was not sufficient.

It may be contended the legislature by section 2794 intended the removal from office by the appointing power, for either a fixed or indefinite term of the appointee, should be for a less cause than that authorizing an impeachment; and while this is no doubt true, still the cause was not prescribed, and when for a fixed term, unless otherwise expressly provided, the party sought to be removed is entitled to be heard, and the attempt to confer the power (if such was the proper construction of the statute) on the mayor to remove, with the consent of the aldermen, without trial or an opportunity to be heard is a nullity.

"Where the officer is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice and an opportunity to be heard." (Throop on Public Officers, page 364.)

This rule is fundamental, and as both the Constitution and the legislature are silent as to the cause for removal the delinquent officer may be impeached before the aldermen with notice and that as at the common law. That the legislature intended to place a limitation on the power of the mayor to remove these officials, if embraced by the section referred to in requiring *reasons to be given*, is unquestioned, as well as for the purpose of protecting those who are com-

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petent to fill the position, and who faithfully and honestly discharge their duties; and there is but little protection when the opportunity to be heard is denied.

The judgment in each case is affirmed.

Judge Guffy delivered the following separate opinion:

I concur in the affirmance of the judgments, but dissent from the reasons given in the opinion.

It seems to me that the legislature, under section 160 of the Constitution, has plenary power as to the manner of and cause for which city officers may be removed, and it is within the power of the legislature to authorize the mayor to remove the officers mentioned for any cause or reason to him deemed sufficient, although such cause or reason might not imply either malfeasance, misfeasance or incompetency, and that, too, without notice or hearing; but the power of removal given in section 2794 of the Kentucky Statutes does not clearly include the power to remove the officers in question.

Judge DuRelle delivered the following dissenting opinion:

I dissent from the opinion of the majority in these cases. In my opinion the act for the government of cities of the first class was intended to effect a departure from the character of municipal government which had theretofore prevailed.

A consideration of the whole act shows that it was intended to provide a responsible head of the executive department of the city government, accountable to the people at the polls, and that the subordinates of that department should be responsible, directly or indirectly, to the head. While the act is in terms a general act, there was but one city to which it could apply, and a comparison of its provisions with those of the old city charter leads inevitably to the conclusion that a change was intended whereby greater power, and, at the

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same time, greater responsibility should attach to the office of mayor. Without attempting to state in detail the argument which might be made on this question, I shall give briefly my conclusions.

The mayor, who is the head of the executive department of the city government (section 23), appoints the executive boards, which are subordinate departments or branches of the executive, although not called departments in the statute (section 40). The boards in turn are empowered to appoint the heads of subordinate executive departments (section 48), and they also employ or appoint subordinate executive employes and officers (sections 41, 47, 100).

It is made the duty of the mayor to be vigilant and active in causing the ordinances of the city and the laws of the State to be enforced (section 29). He is required to "exercise a general supervision over all the executive and ministerial officers of the city, and see that their official duties are honestly performed. He may require from them statements in writing concerning the discharge of their duties" (section 31). He may appoint persons "to examine, without notice, the affairs and accounts of any city department, trustee, officer or employe, . . . and to report to him the results of such investigation."

If these powers were all that were attached to the office of mayor, he would be helpless to perform the duties required of him. In what way could he be vigilant and active in causing the ordinances of the city to be enforced if the boards of his appointment, creatures of his creation, were turned upon confirmation into a set of Frankenstein monsters, who could set him at defiance? How could he exercise a general supervision over all the executive and ministerial officers of the city, and see that their official duties are hon-

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estly performed, if those officers are responsible alone to a tribunal over which he has no control, though appointed by him and sharing his executive powers? What sort of statements in writing concerning the discharge of their duties might he expect from members of the boards who share his powers, and, because it was supposed that they were responsible to him, have been given greater powers than those granted to him? What benefit would he derive from statements of subordinate officials, heads of inferior departments, etc., who are responsible alone to independent and perhaps hostile tribunals? With what obstructions, tangible and intangible, would the examiners appointed by him meet in investigating the affairs of a city department over which he could exercise no control, or of an officer who owed allegiance to a different chief?

Again (section 52), authority is given to refer any matter in dispute as to the powers or duties of said boards or the officers thereof to the mayor, who shall examine and determine the questions involved, and whose decision shall be final as between said boards or said officers. There would be little prospect of a reference of any matter in dispute to the mayor, if the boards are entirely independent of his control.

By section 107 it is provided that "in times of peril from riot, extensive conflagration, disorder, or the apprehension thereof, the chief of police shall be subordinate to the mayor, and obey his orders and directions." With the chief of police subject to removal at pleasure by the board of safety, and with the board of safety entirely independent of and hostile to the mayor, who is to determine whether peril from riot, disorder, or the apprehension thereof, exists, and which of his two masters will the chief of police be likely to serve under such circumstances—the one who has no power over

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him or the one which can decapitate him at pleasure?

The provision for written charges against and trial of policemen before their removal from the force, upon which some stress has been laid in argument, was not part of the original act, and no argument can justly be drawn from it as to the intent of the original act, or the intent of any part of it not affected by the amendment. This amendment(section 2, act of March 23, 1894) was passed, so far as can be inferred from its provisions, as a civil service reform measure designed to take the police force out of politics. The suggestions which have been given, and many more which might be drawn from the provisions of the act, indicate clearly that the intent of the legislature was to adopt the theory which has in modern times become the accepted theory of municipal government, that there should be a responsible head of the municipal executive, and that he should be clothed with authority commensurate with his responsibility.

The modern theory has been well expressed by Judge Cooley: "Experience has also demonstrated the necessity of more power and more responsibility in the executive head of our municipal institutions. Too often the duties of the mayor or executive officer are only nominal, and to these he gives but little attention—a natural result of his want of importance, and of his inability to control the administration of municipal affairs. If the office be clothed with dignity and real authority; if the mayor shall be invested with the veto power; if he shall have the sole right to appoint and the unrestricted power to suspend or remove subordinate officials or heads of departments, then the citizens can justly demand of him that he shall be individually responsible for the proper conduct of the concerns of the municipal-

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ity, and, if grievances exist, they will know to whom to apply for remedy or upon whom to fix the blame."

It is not necessary to suppose that the legislature had the present condition of affairs in mind in passing the act, though it is to be presumed that they considered the contingency of the death or resignation of the mayor during his term. What they probably had mainly in view was the contingency which was to be expected, namely, that the mayor and the boards of his appointment might differ in their views of what was necessary for the proper conduct of the city government, or might become engaged in a quarrel over personal matters; and so the purpose of the legislature being clearly deducible from the act itself, the question remains whether apt language was used to express that intention, and, if so, whether the constitution gave the right to effect the object.

Section 32 provides: "Removal of officials appointed by the mayor. He may, by a written order giving his reasons therefor, remove from office any head of a department, director or other officer appointed my him. A copy of said order shall be sent to the board of aldermen at its next meeting. Unless such order be disapproved by the board of aldermen within thirty days said order shall stand."

It is contended for the boards that this section does not include them upon the ground of the rule of construction "that a statute which enumerates persons or things of an inferior rank, dignity or importance is not to be extended by the addition of general words to persons or things of a higher rank, dignity or importance than the highest enumerated, if there are any of a lower species to which the words can apply." (Black on Interpretation, 145.)

While this rule of interpretation is most generally in-

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voked to prevent the application of a penal statute, in this case it can have no application, for the members of the boards are themselves, within the meaning of the section, heads of departments. Their duties are prescribed by the charter and their departments are subdivided into other departments—as the police and fire—whose heads are appointed by the boards; yet the two great divisions, though not called "departments" are none the less so, and the members of the boards are none the less heads of them. It might as well be said that the mayor is not the head of the executive department of the city government. Moreover, the boards are the only heads of departments to which the legislature can be presumed to have intended the language to apply, for they are the only heads of departments (unless we may call the comptroller's office a department) "appointed by him."

It remains to be considered whether the removal provided for by section 32 was forbidden by section 160 of the Constitution. That section, after providing specifically for certain-named officers of municipalities, and thereby creating what was never known to any former Constitution, namely, constitutional municipal officers, fixing their terms of office and the manner of their selection under various conditions, proceeds: "The General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner and causes for which they may be removed from office, and how vacancies in such offices may be filled."

That section is susceptible of two interpretations: One, that the concluding clause referred only to those municipal offices which were mentioned in the Constitution—that is, to the constitutional municipal offices—and has no application to municipal offices which are the mere creatures of the legislature. The other construction is that the section was

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intended to be permissive; to enlarge the power of the legislature as to offices which had been made constitutional by the new Constitution, and to give to the legislature a power which it otherwise would not have had, inasmuch as the offices had been made constitutional; and in the construction of the constitutional provision the language should be interpreted in its natural sense as it was understood by the people who voted for it. It is difficult to suppose that the average voter, in considering the section which gave the legislature power to provide the manner in and causes for which officers might be removed from their offices, understood or intended that those causes were limited to such as were at common law grounds for impeachment.

In theory Constitutions are made by the whole people. In actual practice they are submitted to them for ratification, and the words used are to be given their common meaning, and not to be construed technically. It must be remembered that under the former Constitutions it was well established and undisputed that the legislature was without power to provide qualifications for constitutional officers in addition to the qualifications provided in the Constitution, or to provide for their removal for any cause other than the causes recognized by the common law at the time of the adoption of the Constitution, or to provide any manner of removing a constitutional officer except upon notice and hearing. (Page v. Hardin, 8 B. Mon.: 648.)

On the other hand, prior to the adoption of this Constitution, it was equally well settled that as to officers which were not constitutional but wholly statutory, the legislature had full power to provide their qualifications and the manner of their removal whether the removal was to be with or

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without cause, or with or without notice and hearing. (South v. Commissioners, 86 Ky., 186.)

Before the adoption of the present Constitution the legislature was omnipotent as to municipal government and municipal officers, and when the new Constitution was adopted, which created certain constitutional municipal offices, a wise provision was inserted to prevent those new constitutional offices becoming subject to the then established rule of law; and the language of this provision must be construed according to its common meaning.

"In interpreting clauses we must presume that the words have been employed in their natural and ordinary meaning. As Marshall, chief justice, says: 'The framers of the Constitution and the people who adopt it must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without any question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." (Cooley's Constitutional Limitations, 6th ed., p. 73.)

In my judgment the constitutional provision is a wise one, and section 32 of the act under consideration was adopted in accordance with the purpose of the constitutional provi-

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sion, which was intended to be permissive and not restrictive upon the power of the legislature.

In passing upon its validity this court should be guided by the well-settled rule of statutory construction which is thus stated by Judge Cooley in his work on Constitutional Limitations: "It has been said by eminent jurists that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.

"The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

"Mr. Justice Washington gives a reason for this rule which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the

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constitutionality of a State law as involved in difficulty and doubt, he says: 'But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground that this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt.'" (Cooley's Constitutional Limitation, 6th ed., p. 216.)

CASE 74—PETITION EQUITY—JUNE 13.

Belknap v. City of Louisville et al.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

99 474
f103 162

99 474
o104 639
104 640
104 645

99 474
112 27
j112 51

99 474
o114 158

99 474
120 593
120 594
o120 596

99 474
e134 441

1. ELECTIONS—ISSUE OF BONDS—SUBMISSION OF QUESTION MUST BE AT GENERAL ELECTION.—The submission of a question to the voters is an "'election" as expressly declared by section 147 of the Constitution of Kentucky; and as section 148 of that instrument provides that "not more than one election in each year shall be held in this State, or in any city, town, district or county thereof, except as otherwise provided in this Constitution," there being no exception in favor of the submission of such questions, they must be submitted at the general election. (Overruling Fidelity Trust and Safety Vault Co., v. City of Morganfield, 96 Ky., 564.)
2. NECESSARY VOTE.—Under the provision of section 157 of the Constitution that no county, town, etc., shall be authorized to become indebted beyond the current revenue for that year, without

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the consent of two-thirds of the voters voting at an election to be held for that purpose, the assent of two-thirds of the electors actually voting at the general election when the question is submitted, is necessary to carry it, and not merely two-thirds of those who vote upon that question. And in this case it is obvious that both the statute and the ordinance under which the question was submitted, require the favorable vote of two-thirds of those voting at the general election.

R. H. BLAIN FOR APPELLANTS.

No brief in the record.

H. S. BARKER AND HUMPHREY & DAVIE FOR APPELLEES.

1. The submission of the question whether the bonds should or should not be issued was not necessarily had at the regular November election, as it might have been done at any other time by proper notice. (Fidelity Trust and Safety Vault Co. v. City of Morganfield, 96 Ky. 564.) And, therefore, the election "held for that purpose," under the provisions of section 157 of the Constitution, although held on the regular election day in November at which officers were elected, was a separate and distinct election, and in estimating the requisite number of voters to carry the proposition, it is immaterial how many votes may have been cast in other elections held on the same day; the only question is how many voted "at an election to be held for that purpose." (Carroll Co. v. Smith, 111 U. S., 556; McCrary on Elections, 3d ed., sec. 173; Thompson's Commentaries on the Law of Corporations, sec. 728; Constitution of Ky., secs. 157, 158, 147, 148; Ky. Stats., secs. 2840, 1459; Armour Bros. v. Board of Finney Co., 41 Fed. Rep., 321; Walker v. Oswald, 68 Md., 155; State v. Barnes, 3 North Dak., 319; Metcalfe v. City of Seattle, 1 Wash., 302; Gillespie v. Palmer, 20 Wis., 544; Commissioners v. Winkley, 29 Kansas., 36; Cass v. Johnson, 95 U. S., 369; State v. Echols, 41 Kansas, 1; Holcomb v. Davis, 56 Ill., 413; Case of Prohibitory Amendments, 24 Kansas, 721; Smith v. Proctor, 130 N. Y., 319; Douglass v. Pike County, 101 U. S., 685; Knox Co. v. Ninth National Bank, 147 U. S., 99; Dillon Mun. Corp., 4th ed., sec. 277; Cooley's Const., Lim., 6th ed., pp. 779, 780; Vance v. Austell, 45 Ark., 406; Yesler v. Seattle, 1 Wash., 308 (29 Pac., 1014); Lamb v. Cain, 129 Ind., 486 (29 Northeastern, 22); Richardson v. McReynolds, 114 Mo., 641; Hogg v. Baker, 17 Ky. Law Rep., 577; Dunavan v. Green, 57 Ill., 67; Chestnut v. Hood, 68 Ill., 138; Melvin v. Lindsey, 72 Ill.,

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67; State v. Mayor of St. Joseph, 37 Mo., 270; State v. Binder, 38 Mo., 450; Sudbury v. Stearns, 21 Pick., 154.)

2. The total value of the taxable property of the city of Louisville was at the "assessment next before the last assessment previous to the incurring of the indebtedness," $104,832,324, and the total indebtedness of the city was $9,150,863, so that an additional indebtedness of $1,000,000 would not make the debt of the city more than ten per cent. of the assessed value of taxable property.

3. But even if the addition of this indebtedness to that of the already, existing debt would have made the total more than ten per cent. of the value of its taxable property, the park system of Louisville is a public improvement, commenced prior to the adoption of the present Constitution, and, therefore, comes within the exception provided for in section 158 of the Constitution. (City of Lexington on App., 96 Ky., 258; Holzhauer v. City of Newport, 94 Ky., 396; Byrne v. City of Covington, 15 Ky. Law Rep., 33; Aydelotte v. Town of South Louisville, 16 Ky. L. R., 166; Beard v. City of Hopkinsville, 95 Ky., 239.)

JUDGE DU RELLE DELIVERED THE OPINION OF THE COURT.

This suit was brought for an injunction to restrain the city of Louisville from issuing a million dollars of bonds for park purposes. There were two grounds alleged for the injunction—the first and main ground urged being that at the election of November 6, 1894, the question of the issue of bonds was submitted to the voters of the city, and that the proposition to issue did not receive the assent of two-thirds of the voters thereof, within the meaning of section 157 of the Constitution and section 2854 of the Kentucky Statutes.

It appears that at the election there were cast in the city of Louisville a total of 32,425 votes; that on the question of the issue of park bonds there were cast only 9,024 votes, of which 6,483 were cast in favor of the issue, and 2,721 against it.

Section 157 of the Constitution provides that "no county,

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city, town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, and any indebtedness contracted in violation of this section shall be void."

It is contended for appellants that the total number of votes cast at the election in favor of the bond issue being less than two-thirds of the whole number cast at the election, the bond issue failed to carry upon the ground that the section referred to requires that two-thirds of the total vote cast at the election shall be cast in favor of the issue.

Appellees contend that the words "two-thirds of the voters thereof voting at an election to be held for that purpose" restrict us to the consideration of the total number of votes cast for and against the question of issuing bonds, and that, therefore, more than two-thirds of the votes of those voting "for that purpose" were cast in favor of the bond issue. In other words, appellee's contention is that in the "election held for that purpose" only the votes cast for that purpose—for and against the bond issue—can be considered, and that no account can be taken of votes cast for other purposes, such as the election of officers, although cast on the same day.

Great stress was laid by appellee's counsel upon the argument that the legislature might have provided for the submission of the question of the bond issue at a special election held on a different day from the regular annual election, and at which no other question or election was determined; and, as at such special election only the votes cast upon the bond issue could be considered, though the vote might,

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and probably would be much less than the vote cast at the regular annual election, therefore, "a question submitted to the voters" is not in any way dependent on or connected with an election of officers, although submitted on the same day and by means of the same ballots; and, as the Constitution left it to the legislature to determine whether the question should be submitted on the day of the general election or on some other day, the action of the legislature in fixing the submission for the same day as the general election did not commingle or make them interdependent. In support of this contention the case of Fidelity Trust & Safety Vault Co. v. Morganfield, 96 Ky., 564, is relied on. In that case it was held that the submission of an issue of bonds for municipal purposes might be upon a different day from that of the general election.

After careful consideration by a full bench a majority of the court are unable to adhere to the doctrine laid down in that opinion. Section 147 of the Constitution requiring elections by the people to be by secret official ballot provides that "the word 'election' in this section includes the decision of questions submitted to the voters, as well as the choice of officers by them."

Section 148 provides that "not more than one election in each year shall be held in this State or in any city, town, district or county thereof, *except as otherwise provided in this Constitution*. All elections of State, county, city, town or district *officers* shall be held on the first Tuesday after the first Monday in November."

It is otherwise provided as to elections for school trustees by section 155, which excepts those elections from the provisions of sections 145 to 154 inclusive, and as to elections for taking the sense of the people of a county, city, etc., as to

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whether liquors shall be sold therein by section 61, which provides "all *elections* on this question *may* be held on a day other than the regular election days."

In this section the word "election" is used in the sense provided in section 147, and this provision indicates clearly that the word is used in section 148 to include questions submitted to the people, for otherwise there would be no need for the permission given by section 61. By section 152 vacancies in the General Assembly may be filled at a special election.

It seems clear that the provision of section 148, that no more than one election each year shall be held in this State or in any city, town, district or county thereof, except as otherwise provided in the Constitution, applies to questions submitted to the voters, and the only provision otherwise in the Constitution in reference to such questions is the one in regard to the submission of questions as to the sale of liquor.

When it is considered that the manifest purpose of the framers of the Constitution, and of the people who ratified and gave it effect, was to put limitations upon the power of the local authorities in the matter of incurring debts, which would result in oppressive taxation, and even to limit the power of the people themselves improvidently to authorize the assumption of such obligations, the wisdom of the restriction of such elections to the day of the general election is evident. Not only is a much larger vote usually brought out on the occasion of the general election, but the people at large are usually better informed of the matters upon which they are entitled to vote by reason of the greater interest taken and the fuller discussion of such matters.

We come now to the main question presented in this record. By section 157 of the Constitution it is provided: "No city . . . shall be authorized or permitted to become indebt-

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ed, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose."

The object of this provision was to limit the power of the local authorities and the people to burden themselves and their posterity with taxation, except upon full consideration and by the assent of the people given understandingly. In order to effect that object it was provided that no city should *be authorized* to become indebted in excess of the current year's revenue without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose. It was sought to protect the people from their own improvidence and that of their local officials, and such a construction must be given to the Constitution as will give effect to its manifest purpose.

There could be but one election in the year except in the cases specially provided for. This question was to be submitted to the people at that election. It was one election, though held for several purposes, and was in no sense a collection of elections held on the same day. One of the purposes of the election was to determine this question, which, under authority of the Constitution, the statute and the ordinance passed in accordance therewith was to be submitted to the voters of the city. It was required that two-thirds of the voters of the city voting at such election should give their *assent* to the bond issue. Assent implies action, and is not mere failure to dissent. At the election held for the purpose of electing various officers, and for the additional purpose of determining the question of the bond issue, there were cast 32,425 votes, and of all those voters voting at the election held for those purposes but 6,483, less

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than one-fifth of the total number, gave their *assent* to the proposition to impose on the city of Louisville the burden of an additional debt of a million of dollars.

The authorities which, to a greater or less degree, bear upon this question are numerous and conflicting. It may be conceded that under a provision like the one under consideration it is not necessary that two-thirds of those entitled to vote should actually vote in favor of the proposition, and that as was said by the Supreme Court of the United States in Carroll County v. Smith, 111 U. S., 565, "the words 'qualified voters' as used in the Constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes; not one who, though qualified to vote, does not vote."

To the same effect are many authorities cited by appellees, and the reason of the rule is well stated in People v. Wiant, 48 Ill., 263, as follows: "It was held in The People *ex rel* v. Warfield, 20 Ill., 160, that to give this provision of the Constitution a practical operation we must presume that it was the intention of the framers of that instrument that the voters would all vote, and that the majority of those *voting* should determine the question.

"To give it a different construction would involve an inquiry whether there were other voters of the county who had, from any cause abstained from voting; and this would lead to interminable inquiry and invite contests in such elections which would be embarrassing and baneful, if it did not destroy all the practical benefits of laws passed under these provisions of the Constitution. . . "

But we are met with a very different question when the question is required to be submitted at a general election

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is one of the purposes for which that election is held, and is required to receive the assent of two-thirds of the voters of the city voting at that election.

In such case the result depends on a majority of all the votes cast at the election being cast for the proposition, and not merely a majority of the votes cast on the particular question.

In the case of People v. Wiant, 48 Ill., 263, the Constitution required that a majority of the voters should vote in favor of the removal of a county seat, and the court held, referring to the case in 20 Ill., 160 :

"In Warfield's case there was no vote taken at that election, except upon the question of the removal of the county seat, and that vote was adopted as the means of ascertaining the number of legal voters of the county, and whether the majority was in favor of or against removal. In this case, however, there was at the same time an election held for circuit judge, which was a regular election. We, therefore, have in this case additional means of ascertaining the whole number of voters of the county. If the return of the various poll books of the county showed a larger number of votes cast for circuit judge or other officer than were cast for and against removal of the county seat, then that should be taken as the number of voters of the county; and it should appear that a majority of the voters at that election had cast their votes in favor of removal before the county seat could be changed. It is not the vote cast upon that single question that is to govern, where it appears that any other election was held at the same time, but it must appear that a majority of all the votes cast at that election were in favor of removal. When there is no other election held at that time the returns of the officers of votes on that question will govern."

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So in People v. Brown, 11 Ill., 478, a case of mandamus to compel township organization under a constitutional provision that "the General Assembly shall provide by general law for a township organization . . . . whenever a majority of the voters of such county at any general election shall so determine," the court said: "The language is clear and explicit and admits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters in the county."

In Everett v. Smith, 22 Minn., 53, the Constitution provided that the question should be "submitted to the electors of the county at the next general election after the passage thereof, and be adopted by a majority of such electors," and it was held that the provision required a majority of the electors voting at the election and not a majority of those voting on the question.

So in Ohio (25 Ohio State, 618), the legislature had authorized the levy of a tax, with this proviso: That the levy should not be made "until a majority of the electors of said township at some regular election shall vote in favor of said levy," and it was held that a majority of all the votes cast at the regular election was required, and not a majority of those voting on the question.

And in 47 Ohio State (6 L. R. A., 422), Ohio v. Foraker, a provision of the Constitution that . . . "if a majority of the electors voting at such election shall adopt such amendments the same shall become a part of the Constitution" was held not to be complied with by a majority of the votes cast on the amendment.

The Ohio Constitution had another provision requiring the adoption of amendments which had been agreed upon by conventions "by a majority of those voting thereon," and

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the court called attention to the difference in language, saying that "if the framers had had the same intention in framing section 1 as in framing section 3 as to how the majority for the adoption of an amendment should be ascertained they would have provided in that section as in section 3 that it should be a majority of those voting thereon instead of a majority of the electors voting at such election."

This is directly in point in the consideration of the case at bar, for in section 256 of the Kentucky Constitution we find it provided that the passage of an amendment to the Constitution shall be determined by "*a majority of the votes cast for and against an amendment;*" and in section 64 it is provided that no county shall be divided, etc., "unless the majority of all the legal voters of the county *voting on the question* shall vote for the same." So that, in two other sections of the instrument, the convention was at no loss for apt words with which to limit the decision to the determination of those only who should vote *upon the question.*

In State v. Lancaster, 6 Neb., 474, the Constitution provided for a township organization, "whenever the majority of the legal voters of such county, voting at any *general election*, shall so determine;" and it was held that as the affirmative vote on the question submitted was less than a majority of those voting at the election the proposition was defeated.

In State v. Winkelmeier, 35 Mo., 103, authority was claimed under a legislative grant of power "whenever a majority of the legal voters" authorized the same, and the majority of those voting on the question were in favor of the grant; but the court said: "It is evident that a vote of 5,000 out of 13,000 is not the vote of a majority."

The case of Hogg v. Baker 17 Ky. Law Rep., 577, was un-

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der section 64 of the Constitution as to the removal of a county seat, which requires two-thirds *of those voting* to decide. That case, however, was decided largely on the ground that the voters were misled, and nothing appears in the record of the case at bar to show that the voters of Louisville were misled, except as it may be argued inferentially from the language of the statute and the ordinance and the smallness of the vote cast upon the question.

Little weight can be given the argument drawn from the fact that at a general election candidates for various offices may be elected notwithstanding other candidates for other offices may have received more than twice as many votes. The statute of election provides that the person receiving the highest number of votes for any office shall be declared elected to that office, and the election is decided by a plurality of votes.

Moreover, it may well be considered that there is an essential difference between the action of electors in voting for a candidate for office and in assenting to the creation of a municipal debt. The former is the exercise of a political privilege, the mere selection of a person to perform officially duties which have been annexed to a particular office, and it is fair to presume that those who do not participate in the election consent to be governed by those who do; but the latter is the authorization of a contract by which the people of the locality incur obligations and bind their property to the payment of a debt; and it is natural to expect that the language used in relation to it will be different; that definite action will be required of a majority of the voters, and that it will be required that their assent thereto shall be *expressed*, and so we find it in the Constitution and the statute.

If the submission were permitted to be and were in fact

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submitted at an election at which no votes were cast except upon the proposition, it might very well be concluded that the words "two-thirds of the voters of the city" meant two-thirds of those who see fit to exercise their privilege, and that the ballot box is the only test to be applied. (L. & N. R. Co. v. Davidson County, 1 Sneed, 637.)

In this case the test of the ballot box shows that only one-fifth of the voters who voted at the election gave their assent to the proposition.

There were many authorities cited on both sides of this question, but it would be unprofitable to review them in detail. A very interesting analysis of a large number of them is given in South Bend v. Lewis, 37 N. E., 986. It will be found that they have turned, in some cases, upon the settled policy of the Constitution which was under consideration, as in the case of Metcalfe v. Seattle, 25 Pacific Rep., 1010, which at first blush appears to be directly in point against the conclusion reached by this court.

In most of the cases the courts' conclusions were reached by considering not only the language of the provision in question, but all other relevant sections of the instrument, as well as its general intent. These differ in the different cases, and it is not surprising that the courts have apparently differed in the weight which they have attached to the arguments drawn from them. Several of the cases cited have been doubted or qualified in subsequent cases. One of them, Gillespie v. Palmer, 20 Wis., 544, much relied on by counsel for appellee, has since been referred to by the chief justice of the Wisconsin court as one of a number of cases "which have long been a reproach to the court, as judgments proceeding upon policy rather than upon principle." (Bound v. Wisconsin Central R., 45 Wis., 543.)

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In all of the cases the object sought was the intent of the instrument.

In the case at bar not much consideration has been given to the debates of the convention, though the members who spoke appear to have given section 157 the same construction with this court: "For, as the Constitution does not derive its force from the convention which framed but from the people who ratified it, the intent to be arrived at is that of the people; and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." (Cooley's Const. Lim., pp. 80-1, 6th ed.)

"Its terms must be taken in the ordinary and common acceptation because they have been so understood by the framers *and the people* who adopted it." (6 Neb., 474.)

These considerations have led us to reject the construction contended for by appellees, of which it may be said, in the language of the Ohio court in State v. Foraker, 6 L. R. A., 422: "But one of the most obvious objections to this construction is that it requires to be demonstrated by such a labored process of occult reasoning upon the meaning of words and phrases so different from the apparent meaning as to warrant the belief that it never occurred either to the framers of the Constitution or to the people who adopted it."

And in this case we can not believe that any considerable number of the voters who read section 157 of the Constitution before voting for its adoption thought for a moment that that provision upon its face restrictive of the power to create additional indebtedness could be so construed as to

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authorize the creation of a million dollar debt upon the vote of some six thousand out of some thirty odd thousand voters actually at the polls.

We are not unmindful of the need for parks in a great city, and the benefits of a park system such as the one proposed and in fact instituted in the city of Louisville, but the people who are to bear the burden must give their assent to the creation of the debt to be incurred for that purpose.

There is another ground upon which this conclusion might be rested. The constitutional provision is restrictive. It forbids the creation of the debt unless upon the assent of two-thirds of the voters, etc. Had section 157 provided, as in section 64, that it should not be authorized unless two-thirds of the voters of the city "*voting on the question* shall vote for the same," that would not have required the legislature to authorize the submission of the question, nor the city authorities to submit it. So as the right to submit might have been denied altogether, it might be given with additional restrictions, as the requirement of a three-fourths vote; and when the city council by ordinance provided for the submission to the vote of the people, it might have imposed an increased restriction; so that if we were of opinion that the Constitution required only two-thirds of those *voting on the question*, we must still look to the act and the ordinance to find if they, or either of them, require any additional prerequisite to the bond issue. The statute is as follows:

"Section 2854. For the purpose of raising money for the purchase or improvement of lands for park property the general council of a city may, by ordinances, submit to the qualified voters of the city the question as to whether the city shall issue bonds, without interest coupons attached, to

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the amount and of the character set forth in such ordinances; and when such ordinance is passed it shall, at the next November election, be submitted to the qualified voters of the city; and if it receives assent of two-thirds of those voting the bonds so voted shall be issued by the city and delivered to the board of park commissioners."

This requires the proposition to be submitted at the November election to the qualified voters of the city, "and if it receives the assent of two-thirds of those voting the bonds so voted shall be issued," etc. What is meant by those voting? Clearly those voting at the November election.

The ordinance is still more explicit. It provides:

"Section 5. At the November election of 1894 there shall be submitted to the qualified voters of the city of Louisville the question as to whether the city shall issue said bonds, and the said bonds shall not be issued unless at said election two-thirds of those voting shall vote in favor of the issuing of said bonds, as herein provided. In the event that two-thirds of those voting at said election shall vote in favor of issuing said bonds, then the fact that they have done so shall be certified to by the mayor upon said bonds, and the said bonds shall then, but only in that event, be issued by the city and delivered by the mayor to the board of park commissioners of the city of Louisville, to be by the said board of park commissioners used and disposed of for the improvement of lands for park property as provided by law."

This requires the submission at the November election of 1894, and provides that the bonds shall not be issued "*unless at said election* (*i. e.*, the November, 1894, election) two-thirds of those voting shall vote in favor of issuing said bonds. In the event that two-thirds of those *voting at said election* (the November election), shall vote in favor of issuing," etc

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It is obvious that both the statute and the ordinance require the favorable vote of two-thirds of those voting at the general election.

Judge Landes dissents from that part of this opinion which holds that questions submitted to the people must be submitted at the regular election, being of opinion that the provision in section 157, requiring the assent of two-thirds of the voters "voting at an election to be held for that purpose," requires that there shall be a special election *held* "for that purpose," and that such special election can not be held on the regular election day, the words quoted being a mandatory *provision otherwise* within the meaning of section 148. Judge Landes concurs, however, in the other principles stated in the opinion.

The other questions raised in the record need not be considered.

For the reasons given the judgment is reversed with directions to sustain the demurrer to the first paragraph of the answer and for further proceedings consistent with this opinion.

CASE 75—PETITION FOR WRIT OF PROHIBITION—JUNE 16.

Gibbs v. Board of Aldermen of the City of Louisville.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. MUNICIPAL OFFICERS—RIGHT OF BOARD OF ALDERMEN SITTING AS A COURT TO REMOVE—JURISDICTION.—Section 2781 of Kentucky

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Statutes provides that executive and ministerial officers in cities, unless otherwise provided, shall be removable by the board of aldermen sitting as a court, on charges preferred; and the jurisdiction therein conferred to try such officers is not taken from it as to park commissioners, by the provisions of section 2847, that if any member of the board of park commissioners commits a felony he shall immediately cease to be a member of the board.

2. CONSTITUTIONAL LAW.—The power to remove municpal officers, which is granted the board of aldermen in cities of the first class by section 2781, of the Kentucky Statutes, "sitting as a court, upon charges preferred," is not strictly judicial, and the fact that it is called a court does not make the entire act unconstitutional because violative of the provisions of section 109 of the Constitution; and while the board of aldermen may be termed, while acting in that capacity, in one sense, a court, it is an organized municipal body with power to remove city officials, which the legislature is authorized to create under the provisions of section 160 of the Constitution.

HARGIS & TURNER FOR APPELLANT.

1. The appellant can not be removed from his office under the general charge that he was guilty of offenses, infamous in their nature; the words "upon charges preferred by the mayor," must mean charges of *official* misconduct. (Com. v. Williams, 79 Ky., 47; Com. v. Barry, Hard., 238; Com. v. Chambers, 1 J. J. M., 160; Tompert v. Lithgow, 1 Bush, 180.)
2. The board of aldermen has no power under the provisons of section 2781 to remove a park commissioner, as the manner of and cause for removal of park commissioners is "otherwise provided for" in section 2847.
3. The attempt upon the part of the legislature to create a court out of the board of aldermen is directly in conflict with the provisions of section 109 of the Constitution, which provides that "the judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in a senate sitting as a court of impeachment, and one supreme court (to be styled the Court of Appeals), and the courts established by this Constitution." (Constitution of Kentucky, sec. 109.)
4. The provision of section 160 of the Constitution that "the General Assembly shall prescribe the manner in which they (municipal officers) may be removed from office," means that the form of the proceeding, either by impeachment, information, indictment, address, or arrest by warrant, shall be prescribed by the legis-

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lature; and does not confer upon it the power to create a court. (Constitution of Kentucky, sec. 160.)

F. HAGAN OF COUNSEL ON SAME SIDE.

H. S. BARKER AND KOHN & BAIRD FOR APPELLEES

1. The board of aldermen of the city of Louisville, sitting as a court, is neither an *inferior* court nor a court of *limited jurisdiction* within the meaning of section 479 of the Civil Code, and, therefore, no writ of prohibition can issue against it. Such court as to the questions submitted to it, is of original, exclusive and general jurisdiction, and not inferior to any power or court in this State. (Jacob's adm'r v. L. & N. R., 10 Bush.)
2. Such a body, while called a court and while exercising judicial functions in that it decides causes, its functions are purely administrative and political, and not judical in the sense that it is, within the jurisdiction of that co-ordinate branch of the government or encroaches upon its powers. (Spelling on Extraordinary Relief, vol. 2, secs 1722, 1727 and 1744; People v. Lake County Court, 6 Col., 534; Meeling v. City Council, Dudley (Ga), 221; Donahue v. County, 100 Ill., 99.)
3. Section 109 of the Constitution when read and construed along with all the other sections of that instrument relative to the judicial department of the government, shows that the department thus established and the courts mentioned therein, other than which none can be established by the legislature, refers exclusively to the administration of property rights and the rights to life and liberty upon principles of law and equity; and does not refer to *quasi* judicial bodies, or to legislative bodies, whether called courts or not, established for the purpose of hearing evidence and deciding questions belonging exclusively to the political and administrative department of the government.
4. At common law, and independent of any statute, the council of the city government has a right to remove any city officer for cause; any corporation has the inherent right to remove an officer for cause, and the removal may be for any act that tends to destroy the corporation or interferes with its good government. (Dillon on Municipal Corporations, secs. 242, 251; State v. Chamber of Commerce, 20 Wis., 63; Willard's Appeal, 4 R. I.; State v. Council of Watertown, 9 Wis., 258; Evans v. Philadelphia Club, 50 Pa. St., 125; People v. Medical Society, 24 Barbour, 578; Com. v. St. Patrick's Society, 2 Binn. (Pa.), 448.) And the offense of bribery is one for which a city officer may be removed without previous in-

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dictment. (Rex. v. Carlyle, Fortescue, 200; S. C. Mod., 379; Dillon, vol. 1, p. 335.)

5. Section 2781 providing for the removal of city officials by the board of aldermen on charges preferred, and the provisions of section 2847 that if any member of the board of park commissioners commits a felony, he shall cease to be a member of the board, in no sense conflict, but provide for wholly distinct and separate matters. Section 2847 is self-executing and requires the exercise of no judicial functions for its determination, while under the provisions of the other section there must be charges preferred, a court organized, a trial had, and judgment entered.
6. Even if section 2781 is void, as the board of aldermen had jurisdiction to try appellant independent of the statute, it had the jurisdiction to try the question as to whether or not that section was void, and whatever decision it may have rendered on that question was not void but only erroneous, and, therefore, the writ of prohibition will not lie. (Arnold v. Shield, 5 Dana, 20.)

CHIEF-JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This case involves a question of jurisdiction only. The appellant, Gibbs, was a member of the board of park commissioners, and, for causes alleged, was cited to appear before the board of aldermen upon a proceeding to remove him from office. The jurisdiction to remove the appellant is found in section 2781 of the Kentucky Statutes, and is as follows: "Executive and ministerial officers, unless otherwise provided in this act, shall be removable by the board of aldermen sitting as a court, under oath or affirmation, upon charges preferred by the mayor or any two members of the board of councilmen," etc.

It is claimed that the manner of removing such an official has been otherwise provided for under section 2847 of an act for the government of cities of the first class. That section reads: "If any member of said board (park commissioners) cease to be a *bona fide* resident or housekeeper of the city, or incur any of the disqualifications mentioned herein,

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or become incapacitated to perform any of the duties of commissioner, or be found guilty of any felony or high misdemeanor, he shall immediately cease to be a member of said board." And that, by the provisions of this section, the board of aldermen are in effect prohibited from removing the appellant by impeachment, and that, if such jurisdiction is attempted to be given, that no such power exists, as is shown by the change made in the present Constitution on this subject. The Constitution of 1849 provided: "The judicial power of this Commonwealth shall be vested, both as to matters of law and equity, in one supreme court (to be styled Court of Appeals), the courts established by this Constitution, and such courts inferior to the supreme court as the General Assembly may, from time to time, establish." The present Constitution provides: "The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate, when sitting as a court of impeachment, and one supreme court (to be styled the Court of Appeals), and the courts established by this Constitution."

So it is contended that the new or present Constitution created all the courts necessary for the purposes of State government and withheld from the legislature the power to create courts, as was authorized by the Constitution of 1849. Section 160 of the present Constitution left with the legislature the right of determining the manner in and the cause for which city officials may be removed; and, while the board of aldermen may be termed, in one sense, a court, it is an organized municipal body, with the power to remove city officials, and is not a court of impeachment, nor was it ever contemplated by the framers of the Constitution that city officers could be removed by impeachment proceedings before the State Senate. Angell & Ames on Corporations, sec-

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tion 110, say: "That the power of *amotion* is incident to every corporation." Mr. Dillon, in his work on Municipal Corporations, says: "The power to remove a corporate officer from his office, for reasonable and just cause, is one of the common-law incidents to every corporation." And the framers of the Constitution, recognizing the common-law rule on the subject, by an express constitutional provision, gave the power to the legislature to provide the manner and the causes for which officials of municipal governments may be removed. This power to remove is not strictly judicial, and was not so regarded at common law; and the fact that the board of aldermen is called a court does not make the entire act unconstitutional.

We have recently held, in the case of Todd, mayor, v. The Boards of Public Works and Safety, that where no causes of removal have been designated, the common-law rule supplies the defect, and if the causes are assigned as to the removal of a park commissioner, there is no other mode of proceeding pointed out than the section of the statute giving to the board of aldermen the power to determine such questions. This is the only tribunal provided by the charter, and that the board has the jurisdiction to remove the official for misfeasance or malfeasance in office as well as for causes that unfit him for the place is, we think, unquestioned. (Hinkle v. City of Louisville.)

This case has been heretofore in this court on questions bearing on this issue now presented. The case will be found reported in 96 Ky., 407. And the court held the party could not be indicted and punished for perjury because the committee, as constituted, making the investigation was not authorized to administer an oath; but this did not affect the

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jurisdiction of the board to try the appellant for the offenses charged.

We have nothing to do in the case before us as to the guilt or innocence of the appellant. As before stated, the only question is as to the jurisdiction of the board of aldermen to try the appellant.

It is not necessary to determine whether there should be a conviction by a court of competent jurisdiction, under an indictment for bribery or perjury, which of itself would render the office vacant, before the board could act. Other charges are made of an indefinite character that may affect the discharge of his duties as an official, or, if not, render him unfit for the place. But, as before stated, we are not investigating such questions, but only the one of jurisdiction.

The judgment is, therefore, affirmed.

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CASE 76—PETITIONS ORDINARY—JUNE 17.

Newport News & Mississippi Valley Company v. Stuart's Administrator.
Same v. Stuart (Two Cases).
Same v. Wyatt.

APPEAL FROM GRAVES COMMON PLEAS COURT.

1. RAILWAY ACCIDENT AT CROSSING—NEGLIGENCE—PEREMPTORY INSTRUCTION.—In an action for damages against a railroad company, charging negligence as the cause of a collision at a cross-

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ing, and in which contributory negligence was pleaded as a defense, it appearing that by reason of the conformation of the surrounding country travelers upon the highway approaching the crossing could not see a train coming until within twelve or fifteen feet of the crossing, but that the engineer and fireman on the train could have seen the danger in time to have stopped the train or so checked its speed as to have avoided the collision, and there being evidence that the whistle was not blown in time to have warned persons on the highway approaching the crossing, a motion for a peremptory instruction was properly overruled.

2. INSTRUCTIONS.—An instruction submitting to the jury the question as to the intelligence of an infant killed in the collision, could not have been prejudicial to defendant, because the plaintiff's evidence showed that he was a remarkably bright and intelligent boy.

3. FLAGMAN AT CROSSING—WHEN REQUIRED.—When a crossing is near a populous town, and must be crossed by a large number of people going to and from the town, both on horseback and in a vehicles, and the conformation of the surrounding country is such that one can not see trains approaching from one direction until within fifteen or twenty feet of the track, and when under certain conditions, which are not infrequent, the approach of the train or its whistle can not be heard, the railroad company should be required to have a flagman at that point to warn travelers of approaching trains, or to adopt and use some other reasonably safe mode of warning them.

SMITH, ROBBINS & THOMAS FOR APPELLANT.

1. A railroad company has the right of way of its roadbed, and may run its regular trains on time, or irregular or extra trains, as its business may require; and is only required to use ordinary care in providing and using reasonably safe means of warning to persons traveling along the highway over its track, of the approach of trains to a crossing. The track itself is a warning to the traveling public at all times. (L. C. & L. R. Co. v. Goetz, adm'r, 79 Ky., 448; L. & N. R. Co. v. Teppenhammer, 10 Ky. L. R., 401.)

2. The evidence of plaintiff showed contributory negligence, but for which the collision would not have occurred, and the peremptory instruction should have been given.

3. The question as to the intelligence of the infants stood admitted by the pleadings, and should not, therefore, have been submitted to the jury.

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4. The instruction as to what is required of a railroad company at its crossings to warn the public of the approach of trains is erroneous, because it points out and names certain means which had not been adopted in this case, although other reasonable means had been adopted. And that part of the instruction requiring an "effectual" mode of warning is certainly erroneous. (Lou. City Ry. Co., v. Weams, 80 Ky., 420; L. & N. R. Co. v. Brownlee, 14 Bush, 595.)

P. H. DARBY ON SAME SIDE.

1. The peremptory instruction should have been given, because the evidence of the appellees themselves shows that they drove the wagon on the track without any effort having been made by any of them to ascertain whether a train was approaching from the north, when any attention by any one of them to the track north of the crossing would have disclosed their danger and enabled them to avoid it. (L. & N. v. Cox, 8 Ky. L. R., 961; Given's adm'r, v. K. C. R. Co., 12 Ky. L. R., 951.)

R. O. HESTER, H. J. MOORMAN AND W. H. HESTER FOR APPELLEES.

1. It is the duty of those in charge of a railroad train to give timely and sufficient warning of its approach to a crossing, and a failure to do so is negligence. The sufficiency of the signal depends on circumstances—notice being the object, and the means must be sufficient to give it. (Ill. Cen. R. Co. v. Dick, 11 Ky. L. Rep., 861; Eskridge v. R. Co., 89 Ky., 374.)
2. When the view is obstructed greater care is required, and those in charge of trains should approach crossings at a less rate of speed and use increased diligence to give warning of its approach. (L. C. & L. Ry. Co. v. Goetz, adm'r, 79 Ky., 449.)
3. The running of a railroad train over a crossing where a dense population is constantly crossing the track, as in this case, without some one to give notice of the approach of trains, is negligence of the most flagrant character. (Cen. Pass. Ry. Co. v. Kuhn, 9 Ky. L. R., 727.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

The appellees, in separate suits in the Graves Court of Common Pleas, recovered judgments against the appellant,

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and appellant's motions for new trials having been overruled it prosecuted appeals to the Superior Court of Kentucky, which court affirmed the judgments, and the appellant obtained appeals to this court, which appeals, upon request of parties, are heard together.

It appears that W. H. Stuart, Charles Stuart, Zephyr Wyatt and Robert Stuart attempted to cross the railroad track in a wagon, and a collision occurred between the wagon, and a locomotive, resulting in the instant death of Robert Stuart and the injury of the others. Four actions were brought against the railroal company, in which it was charged that the collision was the result of the appellant's negligence. One of the actions was by the personal representatives of Robert Stuart, and one by each of the other persons injur

The defense in each case was a denial of negligence, and a plea of contributory negligence on the part of the injured parties. The pleadings, the evidence and the rulings of the court in each case were substantially the same, and will be disposed of in one opinion.

The highway crossed the railroad a short distance north of the corporate line of Mayfield, Ky., and about fifteen or twenty feet south of a deep cut. The north end is about two hundred and eighty yards from the crossing. The whistling post is about two hundred and sixty-five yards from the north end of the cut. The railroad track is considerably elevated above the highway, and in crossing the grade is steep.

On account of the conformation of the surrounding country travelers upon the highway approaching this crossing from the city of Mayfield can not see a train coming from the north until they get within twelve or fifteen feet of the

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track, but the engineer or fireman on the locomotive can see the horses to a wagon from any point in the cut, and a little distance north of it, when the horses get within twelve or fifteen feet of the track. When the wind is from the south, as it seems to have been on the evening of the injury, it sweeps through the cut and obstructs any sound coming from the north. The highway is the only road leading from the north to Mayfield, and is a thoroughfare continuously used by people going to and returning from Mayfield.

W. H. Stuart, the father of Robert and Charles, was blind; Robert was thirteen years old, Charles was younger, and Zephyr Wyatt was fourteen years old. The train that collided with the wagon was due at Mayfield at seven minutes past 6 p. m.

The evidence tends to show that the parties injured left Mayfield about half past 6, being past the time the train was due at Mayfield. The testimony conduces to show that the parties in the wagon thought the train had passed, and as they drove along their attention was directed to a freight train near the depot and south of the crossing, which train was moving to and fro. The old man cautioned the children to look and listen; he listened. At a point shortly before reaching the crossing they stopped, thinking that the freight train was about to run up to or beyond the crossing. Seeing that it moved back, they drove on, so as to cross before it returned towards the crossing. They did not see nor did they hear the whistle or other sound of the train which was approaching from the north. Just as they got on the track, and when it was too late to turn back, they saw the train almost upon them; the driver whipped up the team, and as the rear end of the wagon was about to leave the track it was struck by the engine.

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Witnesses, who were just north of the cut and saw the train as it passed, testify that no whistle was blown at the whistling post, and that none was blown until it was about to enter the cut, and then only two short blasts were made in quick succession. (This evidence is contradicted by other evidence.) The train was one of the fastest on the road, its schedule time being about twenty-eight miles per hour; it was behind time, and there is evidence tending to show that it was running very fast.

Plaintiff's evidence also tends to show that if the engineer and fireman had been on the lookout they could have seen the team in time to have stopped the train or so checked its speed as to have avoided the collision.

The evidence for the defendant showed that the usual sound of the whistle was made at the whistling post, and that the whistle was sounded about the time the engine entered the cut, and there is also evidence of several persons hearing the train coming, and, seeing the danger the parties were in, shouted to them, endeavoring to warn them.

The engineer and fireman swear that they did not see the team until the engine was within forty or fifty feet of the wagon, and that it was impossible to stop the train in time to avoid the collision.

Several grounds for a new trial are relied on, some of which need not be noticed.

The evidence entitled the plaintiff to go to the jury, hence the peremptory instruction was properly refused. The second instruction is upon the question of contributory negligence, and is in the usual form, with the exception that it submitted to the jury the question as to the intelligence of Robert Stuart, the boy who was killed. There was in fact no question in the evidence on this point, as all the plaint-

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iff's evidence showed that he was a remarkably bright and intelligent boy, and had driven on the road, hauling wood, etc., often, and, therefore, the jury could not have been misled or the defendant prejudiced by this portion of the instruction.

The third instruction is very seriously and earnestly objected to, which is in the following language: "The court instructs the jury that if they believe from the evidence that, by reason of the proximity of the crossing to the city of Mayfield and the number of the traveling public crossing there, or by reason of any obstruction of view of the railroad or of the hearing of the approach of trains, said crossing was exceptionally or unusually dangerous, then it was the duty of the defendant to use ordinary care to discover such danger, and, if necessary to avoid injury to travelers, to keep a flagman there to warn travelers of approaching trains, or to adopt and use some other reasonably safe and effectual mode of warning travelers of the approach of its trains; and if the jury believe from the evidence that defendant negligently failed to discover such danger, if any, or negligently failed to provide or use such means of warning as were reasonably safe and effectual to avoid injury to such travelers, and by reason thereof the injury to deceased occurred, then the defendant is liable unless deceased negligently contributed to such injury and death, as defined in instruction No. 2."

The crossing in question was near a populous town; was the only way to the town for the people in the country north of it, and was continuously used by persons on horseback and in vehicles. On account of the elevation of the track above the highway, and the steep approaches to it, it could not be crossed at an ordinary traveling gait; the deep cut and the conformation of the surrounding country were such

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that a person could not see the approaching trains from the north until within fifteen or twenty feet of the track, and, if driving a horse, could not see the train until his horse's head had almost reached the track and further under certain conditions, which were not infrequent, many persons, especially when riding in a wagon, could not hear the approach of a train or its whistle.

Under the circumstances it was the duty of the company to use more precaution to avoid injury to persons using the highway than at ordinary crossings; and, those conditions existing, it was not improper to require the company to have a flagman at the point to warn travelers of approaching trains, or to adopt and use some other reasonably safe mode of warning travelers. (L. C. & L. R. Co. v. Goetz's adm'r 79 Ky., 449, 80 Ky., 103.)

But it is still further urged that the instruction is erroneous because it required the company to use an effectual mode of warning travelers. In other words, that it made it incumbent upon the company to adopt some mode that would make it impossible for a person to be injured.

We do not think that the instruction could have been so understood by the jury. The evident meaning was that the means should be reasonably effective.

The other instructions given give to the plaintiffs no right to recover unless the defendant was guilty of negligence, and manifestly the jury believed the defendant guilty of negligence in each case.

The other instructions given were not prejudicial to the substantial rights of appellant in either of the cases, and those asked by appellant were properly refused.

Judgment in each of the cases is affirmed.

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CASE 77—PETITION ORDINARY—JUNE 18.

Manion, By, &c., v. Ohio Valley Railway Company.

APPEAL FROM HENDERSON CIRCUIT COURT.

1. GUARDIAN AND WARD—RIGHT OF GUARDIAN TO COMPROMISE CLAIM OF HIS WARD.—Without statutory restraint, a guardian may compromise, settle and release claims and demands due to, or made by or on behalf of his ward, and the ward will be bound thereby, unless it is done in bad faith, or in fraud of his rights.
2. STATUTORY CONSTRUCTION.—The provision of section 2030 of the Kentucky Statutes that a guardian "with leave of court, may compound a debt or demand" of his ward, means only such debts or demands as may be due or owing to the ward, and not such as are of the nature of unliquidated damages for tort to the person or property of the ward, and a settlement by the guardian without leave of court of such a claim for unliquidated damages is binding on the ward, if made in good faith.

S. B. & R. D. VANCE FOR APPELLANT.

1. While at common law the guardian had authority to compromise or compound a claim or demand of his ward. the provision of section 2030 of the Kentucky Statutes that he may do so "with leave of the court," was intended to and did abrogate that common-law right, and negatives his authority to do so, in any other way than as therein provided. (Hayes v. Mass. Mut. Life Ins. Co., 18 N. E. Rep., 322 (Ill.), and authorities there cited.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

The question raised in this case is whether the guardian of the infant appellant had the lawful power to bind him by compromising a claim for damages against the appellee, alleged to have been caused by reason of the negligence of the appellee.

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It seems that the infant appellant was in the service of the appellee company on the 27th day of July, 1892, in the capacity of watchman and fireman on one of its engines, and that on that day, at McLean Station, on Green River Island, between Henderson and Evansville, he stumbled over a pile of rocks and fell upon the railroad track in front of the engine, and his leg was run over and broken and "so badly mutilated that it had to be amputated just below the knee."

Afterwards James F. Manion, his father, was appointed and qualified as his guardian, and compromised with the company for the sum of four hundred dollars, which was paid by the company and the receipt of the guardian taken for the amount, which reads as follows: "Received, March 31, 1893, of the Ohio Valley Railway Company, the sum of four hundred dollars, in full compromise, satisfaction and discharge of all claims or causes of action against it, or any of its lessees, and particularly of all claims or causes of action arising out of injuries received by Matthew Manion, by loss of leg, by being run over by engine No. 6, on O. V. Railway, near mile 494, on or about July 27, 1892."

Action was commenced against the company by the infant, suing by his said guardian, on the 30th day of June, 1893, seeking to recover five thousand dollars in damages for the alleged injury. Defense was made, in which the alleged negligence was denied, and the said compromise and payment of four hundred dollars, and receipt therefor, were set up as a full discharge of the company from all further liability to the infant appellant.

In the reply it was admitted in substance that the compromise was made, and the four hundred dollars were paid as alleged in the answer; but it was averred that "in consideration of the payment of said sum, and the agreement of

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defendant to furnish a place and employment to the plaintiff, his guardian did agree that same should be a settlement of all claims and causes of action against the defendant arising out of said injury."

It was then averred that the company, having paid the four hundred dollars, "refused to give employment to plaintiff, as it had agreed," and that "*said agreement was made by his said guardian without leave of court, and was not binding on him.*" A demurrer to the reply was filed and sustained by the court and the petition dismissed, and that judgement is before us on this appeal.

Without statutory restraint a guardian may compromise, settle and release claims and demands due to or made by or on behalf of his ward, and the ward will be bound thereby unless it is done in bad faith or in fraud of his rights. Authorities on this question are collated in a valuable note to the case of Hayes v. Massachusetts Mutual Life Ins. Co.. 1 L. R. A., 304, decided by the Supreme Court of Illinois.

It is insisted by counsel for the appellant that the powers of guardians in this State are restricted by statute, and that the compromise made by the guardian in this case was unauthorized, and was not binding on the infant appellant.

The statute relied on is section 5 of article 2 of chapter 48 of the General Statutes (Kentucky Statutes, section 2030), which contains the following provision with reference to the duties and powers of guardians, viz.: "He shall receive and sue for the *debts and demands owing to the ward*, defend actions against him and, with leave of court, may compound *a debt or demand*."

The contention is that the compromise, having been made by the guardian without leave of court, was without authority, or beyond the authority conferred upon him by law, and was, therefore, not binding on the infant appellant.

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It does not appear that this question has heretofore been passed on by this court, nor do we deem it necessary in this case to determine how far the powers of guardians are restricted by the statute with reference to the compounding of *debts and demands owing to their wards*, for it is manifest that the claim for damages here is not the kind of claim which is embraced in the meaning of the words "debt or demand" used in the statute, and which a guardian may not "compound" without leave of court, the words used, in our opinion, being intended to designate or describe such claims as may be *due or owing* to the ward, and, consequently, not such as are of the nature of unliquidated damages for tort to the person or property of the ward. (Anderson's Dictionary of Law, *in loco* "Claim," "Demand.")

We hold, therefore, that the guardian had the power and authority in law to compromise the claim, and that the court did not err in sustaining the demurrer to the reply. If the terms upon which the claim for damages was compromised have not been complied with, that is not a matter that was cognizable in this case; and if there was bad faith or fraud in the transaction on the part of the company it does not appear from the averments in the reply.

Finding no error, the judgment is affirmed.

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CASE 78—AGREED CASE—JUNE 19.

City of Covington v. McKenna.

APPEAL FROM KENTON CIRCUIT COURT.

1. MUNICIPAL INDEBTEDNESS—BOND ISSUE—CONSTITUTIONAL CONSTRUCTION.—Under the provisions of section 3101 of the Kentucky Statutes, authorizing certain street improvements in cities of the second class, which are to be paid for by the abutting property owners, and wherein the property owner is given the option either to pay in cash or in ten annual payments, and authorizing, in order to provide for the immediate payment of the cost of improvement where the property-owners elect to pay on the ten year plan, the borrowing of money and the issual of bonds therefor, "pledging the faith and credit of the city for the payment of the principal and interest thereof," the bonds to be in ten series, maturing annually through the ten year period, if the issue of the bonds will cause the city to become indebted to an amount exceeding in any year the income and revenue provided for such year, the question as to whether they shall be issued must be submitted to a vote of the people and receive the assent of two-thirds of them at an election to be held for that purpose; and this must be done, although the bond issue is to be "in anticipation of the collection of a special assessment for such improvement . . . from such property holders."

W. MC. D. SHAW FOR APPELLANT.

1. The faith and credit of the city of Covington is pledged for the payment of the bonds and interest, and although the fund arising from the special assessment is also so pledged, it is, nevertheless, "an indebtedness" of the city, and being greater than the current revenue for the year, the question of issuing the bonds, must be submitted to a vote of the people. (Secs. 3073 and 3101, Ky. Stats.; Unites States v. Fort Scott, 99 U. S., 152; Hitchcock v. Galveston, 96 U. S., 347.)

C. B. SIMRALL FOR APPELLEE.

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1. The agreed facts show that the city of Covington, a city of the second class, had an indebtedness at the time of the adoption of the Constitution exceeding ten per centum of the assessed value of its taxable property; and it is, therefore, empowered under the provisions of section 158 of the Constitution to increase its indebtedness two per centum.
3. The agreed facts show that the payment for these improvement bonds, both principal and interest, will be provided for and paid from a special tax levied under the provisions of the law upon property abutting on the improved streets, and that no general tax will be required to pay either principal or interest of the bonds.
3. While it is true the city must submit to the voters the question as to whether a debt that is to be paid by general taxation shall or shall not be incurred, yet it can not be that the city, before it can construct a street, for a block or a part of a block, in the manner authorized by its charter, must submit the question of construction to a vote of the people. (Hitchcock v. City of Galveston, 96 U. S., 341.)

JUDGE DU RELLE DELIVERED THE OPINION OF THE COURT.

This is an agreed submission of a question for decision.

By section 158 of the Constitution it is provided that cities of the second class, to which appellant belongs, shall not be permitted to incur indebtedness to an amount, including the then existing indebtedness, in the aggregate exceeding ten *per centum* on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness.

After providing for indebtedness authorized laws in force prior to the adoption of the Constitution, and for the completion of public improvements undertaken prior thereto, this section further provides that "if, at the adoption of the Constitution, the aggregate indebtedness of the municipality, including that which it is authorized by this section to contract, shall exceed the prescribed limit, then it shall not be permitted to increase its indebtedness in an amount ex-

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ceeding two per cent. in the aggregate upon the value of the taxable property therein until the aggregate of its indebtedness shall have been reduced below the limit fixed, and thereafter it shall not exceed the limit, except in case of emergency."

By section 3096, Kentucky Statutes, cities of the second class are authorized to improve streets by original construction, at the cost of abutting property holders, upon the petition of the holders of a given proportion of such property, and by section 3101 such improvement may be paid for on the ten year plan, the owner of the abutting property having the option to pay in cash or in ten annual payments. To provide for the immediate payment of the proportion of the cost of the improvement assessed against those property holders who elect to pay on the ten-year plan, the city is authorized to borrow the money and issue bonds therefor, "pledging the faith and credit of the city for the payment of the principal and interest thereof," the bonds to be in ten series, maturing annually through the ten-year period.

It is provided that the bond issue thus authorized is to be "in anticipation of the collection of a special tax or assessment for such improvement or re-improvement from such property holders;" that the property shall be in lien for the assessment until it is paid; and in the succeeding section, that no local assessment for street improvement shall exceed one-half of the value of the property assessed.

Under these statutory provisions an ordinance was passed providing for the issue and sale of bonds of the city, and providing a fund for the payment of the improvement of Twentieth street with brick pavement.

By the agreed statement of facts it appears that all the statutory prerequisites to the bond issue had been regularly

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performed—by the petition of the property owners, the passage of the ordinance in accordance with the charter provisions, advertisements for bids, contract for the improvement, etc.

It further appears that no general tax levy will be necessary to pay the bonds if issued, but that they will be paid by the tax levied and assessed upon the property abutting on the improvement; that at the time of the adoption of the present Constitution the debt of the city was fourteen per cent. of the assessed value of the property therein, and has never since that adoption reached two per cent. of the assessed value, in addition to the percentage which existed at the time of the adoption, or of any subsequent valuation thereof.

The assessed value of property in the city in 1891, when the Constitution was adopted, was $17,470,965, and the city debt was $2,444,300, or about fourteen per cent. of the assessed value. An addition of two per cent., or $349,419.30, would make a total of $2,793,719.30, the maximum which the city can incur until the assessed value shall so increase that ten per cent. of it will be greater than its indebtedness. It is agreed that the debt of the city has never reached that figure, though the assessment has increased in amount.

Upon this state of facts the court below held, first, that section 158 of the Constitution does not prevent the issue of the $6,000 of bonds provided for by the ordinance, and in this conclusion we concur; and, second, that neither section 157 of the Constitution nor section 3073 of the Kentucky Statutes required the assent of two-thirds of the voters of the city before the bonds could be issued.

The latter conclusion was reached upon the theory that "the amount of the debt incurred and maturing each year will be met by the special tax, and will not exceed the city

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income or revenue provided for that year;" and that. therefore, the assent of two-thirds of the voters is not required by section 157 of the Constitution.

Section 3073, Kentucky Statutes, permits the additional two *per centum* indebtedness allowed by the Constitution (section 158) to cities of the second class, which had already a ten *per centum* debt at the adoption of the Constitution, provided the assent of two-thirds of the voters, voting at an election, etc., be obtained. It provides further for the issue of bonds for such increased indebtedness, and for the levy of an annual tax to pay the interest and create a sinking fund for the payment of the principal; and the tax thus provided for is evidently a general one, to be levied on all the taxable property of the city .

It is very plausibly argued that as this section provides for a general indebtedness, which will be a charge upon all the taxable property of the city, it can have no application to the street improvement bonds provided for by section 3101, which are intended to be paid out of the sums realized from the assessment upon the abutting property. It is unnecessary, however, to pass upon this question.

The main question remaining is whether, under section 157 of the Constitution, the issue of the bonds in question will cause the city to become indebted to an amount exceeding, in any year, the income and revenue provided for such year.

It is claimed for the appellee that the amount of the debt incurred and maturing each year will be met by the special tax, and will not exceed the city income provided for that year. This is clearly erroneous. If it is a debt of the city it is incurred in the year in which the bonds are issued, though

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it does not then mature. It is an anticipation of the income of future years.

In Beard v. Hopkinsville (which with extensive annotations is given in 23 L. R. A., 403) this court held that a contract by a city to pay an annual rental for the use of water hydrants and electric lights is a contracting of indebtedness within the meaning of section 158 of the Constitution; but it is contended that because the bonds are to be paid out of the assessments, which are a lien upon the property abutting on the improvement, they are, therefore, not an indebtedness of the city; and that, as the obligation is a current one, to be paid out of the current revenue of each year, as the installments fall due, such disposition and appropriation of future revenue to meet and discharge an obligation which is but a contingent one, and is to mature in the future at the time at which the provision is made to meet it, is not the creation of an indebtedness within the meaning of the Constitution.

It must be remembered that the statute under consideration (section 3101), while it provides for a special assessment to meet the bonds, provides also for "pledging the faith and credit of the city for the payment of the principal and interest thereof;" and, though it is required in section 3102 that no local assessment for street improvement shall exceed one-half the value of the property assessed, values may fall, and the amount realized from the sale of the land assessed may be inadequate to pay the bonds, to say nothing of the assessments proving uncollectible.

As said in the case of Beard v. Hopkinsville, *supra*, . . . "if the words used in the Constitution are to be given their usual and commonly accepted meaning, by the contract in question the city does 'incur an indebtedness' in the sense

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these terms are used in the Constitution, and that this indebtedness is in excess of the limitation imposed is apparent."

So in Springfield v. Edwards, 84 Ill., 626, in discussing a similar constitutional provision, the court said: "The prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay in any manner or for any purpose—when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore, within the prohibition."

In United States v. Fort Scott, 99 U. S., 152, under a statute very similar to the one in question providing for local improvement bonds upon a three-year plan, and that "for the payment of said bonds assessments shall be made each year," etc., the court said: "That the bonds for the amount for which the relator obtained judgment constitute a 'debt' or a portion of 'the bonded indebtedness' of the city, within the meaning of the statute, can not well be doubted;" and this, though the ordinance under which the bonds were issued provided that they should "be paid, principal and interest, solely from the special assessments," etc. (Culbertson v. Fulton, 127 Ill., 30; Law v. People, 87 Ill., 385; Prince v. Quincy, 105 Ill., 138, and 44 Am. Rep., 785.)

We, therefore, conclude that the bonds proposed to be

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issued would create an indebtedness, and, being an appropriation of the income of future years, it would be to an amount exceeding the income provided for the year in which they might be issued, within the meaning of section 157 of the Constitution, and must, therefore, be submitted to the vote of the people.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

CASE 79—PETITIONS EQUITY—JUNE 20.

Briggs, Trustee, v. Town of Russellville.
Town of Russellville v. Beall.

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APPEALS FROM LOGAN CIRCUIT COURT.

1. TAXATION OF FARMING LANDS FOR MUNICIPAL PURPOSES.—Where farming lands have been brought into the city by an extension of its limits, the extension being made for the legitimate purposes of improving the town, and not for the unauthorized purpose only of lessening the burden of taxation on its inhabitants, considering the character and location of the property, its proximity to two railroad depots and shops, and to the business portion of the town, and the actual and prospective growth of the town, and the extension of the police jurisdiction of the town over the locality, and the benefits and advantages necessarily afforded and enjoyed by the owners by reason of the very existence and presence of the municipal government, the property should be required to bear its proportion of the burden of municipal taxation, although the lands were never divided into lots or used as city property.

WILBUR F. BROWDER FOR BRIGGS AND BEALL.

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1. There is not a street within one hundred and sixty-five yards of the inside lines of either the Briggs' or Beall property, and not a sidewalk nearer than that; they have never sold any town lots at any price, and there are no town lots near either place, except a few negro cabins; the town government of Russellville has never expended one cent for the benefit of either place in the form of police protection, lighting, water facilities, streets, sidewalks, passways, alleys, or any other improvement, benefit or advantage; and to tax this property for town purposes will be the taking of private property without compensation. (Trustees of Elkton v. Gill, 94 Ky., 138.)

M. P. SLOSS OF COUNSEL ON SAME SIDE.

JAMES H. BOWDEN FOR THE TOWN OF RUSSELLVILLE.

1. The tax must be paid unless the court is able to say from the facts of the case that the obvious purpose of the extension of the town limits, or its evident effect, was spoliation; and in this case instead of being spoliation it was a simple act of justice to require these property holders who received more benefits and protection from the municipal government than many who were previous to the extension inside the corporate limits, to bear their proportion of the burden of taxation.

S. R. CREWDSON ON SAME SIDE.

1. When all the decisions of the Kentucky Courts on the question of taxing lands taken into a municipality by an extension of its limits, are considered together, they formulate the rule that the purpose or effect of the act of extension must be spoliation, otherwise the tax must be paid, which state of case does not exist in either of these cases. (Trustees of Elkton v. Gill, 14 Ky. L. R., 755; Cheaney v. Hooser, 9 B. M., 330; Swift v. City of Newport, 7 Bush, 37.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT

These two cases originated in the Logan Circuit Court, involve the same questions and stand upon substantially the same state of facts, except as to the condition use and

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situation of the parcels of land, which it is claimed on the one hand and denied on the other are subject to municipal taxation. On that account they were heard together, both in the court below and in this court. The litigation is friendly, the object being to ascertain whether or not the town of Russellville has the right to impose taxes for municipal purposes on certain land belonging to the appellant, J. B. Briggs, trustee, in one case, and to the appellee, J. H. Reall, in the other case, which was originally brought within the limits of the town by an act of the General Assembly, entitled "An act to extend and define the corporate limits of the town of Russellville, authorize the election of a police judge and provide a sinking fund for said town," approved March 12, 1869. (Session Acts 1869, vol. 2, p. 236.)

Previous to the passage of said act the boundary of the town was in a very irregular and unsatisfactory shape, and while in 1869 it was a thrifty, though quiet town, having a population of near two thousand souls, with a reasonable prospect of growth and of steady improvement, having the advantage of one railroad, with the prospect of the early construction of another, the main object of the extension of the limits seems to have been to correct the irregular shape of the lines defining the limits of the town and at the same time to extend the jurisdiction of the municipal government over a considerable territory claimed to be actually suburban, although not within the lawful limits of the town. This the act accomplished by describing a perfect square of territory, each of the four sides extending four hundred and ten poles, with the county courthouse and public square in the center.

By a previous act, entitled "An act to amend the charter of the town of Russellville," approved March 5, 1868 (Session

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Acts 1867-8, vol. 2, p. 219), the chairman and board of trustees of the town were authorized and empowered to assess and collect annually an *ad valorem* tax "of not exceeding fifty cents on the one hundred dollars worth of real and personal estate within the corporate limits of said town, and a poll-tax of not exceeding two dollars" on each titheable inhabitant of the town, for municipal purposes. Subsequently another act was passed, entitled "An act to amend and reduce into one the acts relating to the town of Russellville," approved May 1, 1880 (Session Acts 1879, vol. 2, p. 874), which was substantially a new charter, and under which the municipal affairs of the town were conducted until the passage of the act for the government of towns of the fifth class, approved July 3, 1893, to which class the town of Russellville now belongs.

By the act of 1880 the boundary of the town was continued as fixed by the act of 1869, and the municipal authorities were empowered to assess and collect taxes for municipal purposes annually upon all of the real and other property in the town, as of the 10th day of January, upon a list of the "taxable inhabitants and owners of property in said town," and the marshal of the town was invested with "all the powers and authority within the town of Russellville to collect the town tax as sheriffs have in collecting the State tax and county revenue."

Notwithstanding the ample power of taxation thus conferred on the municipal authorities to assess and collect taxes on their property within the corporate limits of the town, no effort was made by the said authorities to assess or levy or collect from the appellant, Briggs, and the appellee, Beall, taxes upon their land which was brought into the limits of the town by the act of 1869, and afterwards, by the

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act of 1880, until the efforts made for that purpose, which furnished the occasion for the present litigation.

As we take it, the taxes now involved were assessed in 1893, under the authority of acts in force previous to the passage of the said act of July 3, 1893. Action was instituted by each of the parties seeking to enjoin the town and the collector of the town tax from proceeding to collect taxes, which had been assessed by the municipal authorities on their said respective parcels of land within the limits of the town.

The issues having been made up in each case, in the case of the appellant, Briggs, the court adjudged, in substance, that his land was lawfully assessed, and that he was liable for the tax, and his petition was dismissed. But in the case of the appellee, Beall, the court adjudged, in brief, that his land was not lawfully assessed or subject to the tax and that he was not liable therefor, and the municipal authorities were perpetually enjoined from proceeding to collect the tax that they were then seeking to collect from him on his said land. These appeals are prosecuted to reverse the judgment in each case.

In the case of Briggs, trustee, it appears that he was living with his family upon twelve acres of land that were included within the limits of the town by the acts of 1869 and 1880, which have been referred to, and that the dwelling house and all other improvements were erected thereon in 1872. The track of the Louisville & Nashville Railroad lies in front of this ground and is the south boundary of it. We do not deem it necessary to go into lengthy detail of the facts material, especially in the Briggs' case. It is sufficient to say that the facts show that, although there was no public street or alley or sidewalk contiguous to his ground,

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he and his family had convenient access to the public streets of the town by a driveway out of his lawn across the said railroad track, and thence across a meadow, in which Mr. Briggs had an interest, to the "Hopkinsville pike," laid down on the map of the town as "Hopkinsville street," which leads to the public square and the principal business part of the town, and which is a prolongation of the main center street in the original boundary. His ground is thirty-two poles from the passenger depot of the said railroad, at which is the nearest sidewalk. The same may be said concerning the land of appellee, Beall. Briggs' residence is also something more than one thousand feet from the electric light plant which supplied the town, and from which his residence was supplied, over a line erected at his own expense, with light, which was the nearest point in the business part of town to his house. He had a number of tenement houses situated south of the said railroad track, and somewhat nearer to his ground than the electric light plant. The facts show, further, that his ground was not divided up into lots, but that it constituted one lot upon which, with ample means, he had erected a splendid urban residence, where he and his family were in a position to enjoy and had the privilege of enjoying if they chose to avail themselves of it, all of the advantages and conveniences which were to be afforded by or derived from the presence and energy of the municipal government not only for comfort but for protection as well.

Appellee Beall was the owner of one hundred and eighty acres of land, situated on the western and northwestern boundary of the town, as established by the act of 1869, but all of his land, up to the commencement of his action, had always been used as farming lands, and only seventy-seven and one-

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fourth acres of it were included in the said town boundary, through which, as shown on the map of the town, the Owensboro & Nashville railroad track runs from north to south. No part of this land had ever been divided into lots since the act of 1869. His residence was on that part of his farm that lay outside of the limits of the town and the approach to it was from the "Hopkinsville pike," and from a point thereon beyond the west line of the town boundary. That part of his land within the town boundary, as it appears from the map of the town, is about equally divided by the track or line of the Owensboro & Nashville railroad, but no streets or alleys had been laid out through any part of it, but that part of it east of said railroad is situated on the "Greenville pike," which is a prolongation northward of Main street, and is laid down on the map as "Greenville street," which the municipal authorities in 1882 and since improved at considerable expense for some distance out and in front of Beall's land, but just how far or to what point the record does not show with certainty, but probably to a point nearly half way the length of his line fronting on said street or pike. Along this street and on both sides of it and adjoining Beall's land on the west side, there are several houses, which were occupied mostly by colored persons, erected on lots which were originally a part of the tract in question, but they were laid off and sold prior to 1869. The occupants of said houses used the said street as their only way of ingress and egress to the premises, and appellee Beall used it also when going to and from that part of his land which he entered through a gate opening on the said street or pike. That part of this parcel of land lying between the line of the O. & N. railroad and "Greenville street" is wet but good meadow land, and water rises on and flows from it under a culvert constructed

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across the said street at the expense of the town. There is an area of thirty-four acres of land between appellee Beall's land and the business part of the town, upon which there were not any improved lots except that of appellant Briggs. Appellee Beall had never voted for town officers or held any office in said town, but was engaged in mercantile and other business in the town, and owned other property therein. The lands of both Briggs and Beall, the taxes on which are involved in this litigation, are in the vicinity of the passenger and freight depots of the L. & N. railroad and the shops of the O. & N. railroad, as shown by the map of the town, but they are situated on the side of the line or track of the former road opposite to them which has to be crossed in passing from their lands to the business part of the town, the courthouse and the public square.

The foregoing statement contains the principal facts that are material to the questions raised in the two cases. It is contended by counsel for the appellant, Briggs, and the appellee, Beall, that neither parcel of ground was subject to municipal taxation, briefly because it is not urban property, and had never been used as such, or divided into lots; that the owners had never consented to the extension of the boundary of the town so as to include their land within the town limits; that they had never received any benefits from the municipal government, or consented to be taxed by it; and that to compel them to pay taxes on their said lands to the town for municipal purposes would be the taking of private property without any compensation. On the other hand it is contended by counsel for the town that the situation of the two properties is such, with reference to the streets of the town, and with reference to other houses and lots within the limits that are subject to municipal burdens,

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as to make it proper and right that they should be subject to their fair proportion of these burdens, which are necessary to the maintenance of municipal government for the benefit and convenience of the inhabitants of the town, and for the preservation of public order.

Numerous cases of a character similar to these cases, and in which the same questions were raised, have been decided by this court, and in no such case has it been held that the General Assembly did not have the constitutional power to fix the territorial limits of municipal corporations, either by acts of original incorporation or by subsequent acts extending their boundary lines. We do not understand counsel here to deny that the General Assembly had the constitutional authority to pass the acts of 1869 and 1880, by which the limits of the town of Russellville were extended. Nor do we understand counsel to hold that the municipal power or authority within the limits of the town as defined by those acts is restricted, except in respect of the power to tax the added territory. There were other purposes for which the General Assembly had the constitutional power to extend the jurisdiction of municipal government over territory contiguous to a town or city by extending its limits besides that of taxation. This might be done in any case in anticipation of the future growth of the town or city for the purposes of police protection and the like.

Such an exercise of legislative power was not violative of the constitutional guaranty of private property to the owners, because the land was still their own and could not be taken or appropriated for any public use, such as for streets or alleys, without their consent or without just compensation therefor. (Cheaney v. Hooser, 9 B. Mon., 330; Swift v. City of Newport, 7 Bush, 37.)

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It will be found on investigation, we think, that in most of the States the courts will not interfere in such cases to relieve property owners from taxation by the municipal authorities, because municipal government being an important part of the governmental machinery of the State, it is the peculiar province of the legislative department—the law-making power—to define or provide a method of defining the limits of municipal corporations, and to clothe them with the powers of local government, and that the propriety of legislative action in this regard may not be questioned. In this State, however, as well as in several other States, it has long been the established doctrine that the courts will relieve against the burden of municipal taxation, following the extension of the boundary lines of a town or city, in cases where "the legitimate object of improving the town" has been "palpably perverted to the unauthorized purpose only of lessening the burden of taxation on the inhabitants, who will not be otherwise benefited by the extension." (Swift v. Newport, *supra.*)

In the case of Board of Trustees of Elkton v. Gill, 94 Ky., 138, following Cheaney v. Hooser, *supra*, and Maltus v. Shields, 2 Met., 553, the doctrine is stated in the following language: "The protection afforded to, and advantages received by the citizen from a municipal government are, in the meaning of the Constitution, just compensation for taxation imposed in order to maintain it; and local taxation authorized by law can not be deemed taking private property without just compensation unless it is palpable that persons or their property are subjected to such burden for the benefit of others for purposes in which they have no interest, and to which they are, therefore, not bound to contribute.

In that case a parcel of six acres of land, embracing the

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residence and lawn of the owner, which was within the limits of the town, the land being a part of a tract containing forty-six acres, which was used for agricultural purposes, the part including the residence being adjacent to two streets of the town was held to be subject to taxation by the town.

In Maltus v. Shields, it was held that a lot of about nine acres in the town of West Covington, upon which the owner resided and part of which was in cultivation and part containing evergreens and shrubs and a large number of fruit trees, was constitutionally subject to taxation for municipal purposes.

In the case of Sharp's ex'or v. Dunnavan, 17 B. Mon., 223, it was held that where a town is extended by improvement, so as to give those living adjacent to the town boundary all the advantages which the citizens enjoy from the local government of the town, the legislature had the constitutional power to extend the limits of the town and subject the owners of the property within the extension to taxation for town purposes, and that the legislative discretion in the location of the lines of the extension could not be questioned or controlled by the court.

In that case thirty-four acres of land, including the residence of the owner, being a part of a tract of one hundred and forty acres which were used for agricultural purposes only, were brought within the limits of the town by the legislative act. The owner's residence was situated twenty-five poles from the original boundary of the town, and one hundred and fifty-five poles from the center of the business part of the town, and near enough to enjoy the advantages of schools, churches and the business of the town. This case and that of Cheaney v. Hooser arose under the act of 1846,

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extending the boundaries of the town of Hopkinsville.

Another case, that of Stites v. Dunnavan (MS. opinion), originated under the same act, in which it was decided that the land of the owner that was brought within the limits of the town by the said act, containing twenty-two acres and used as a residence and for pasturing and other agricultural purposes, was liable to municipal taxation.

The foregoing references are sufficient to show the doctrine that has prevailed in this State upon this question, and the manner in which it has been applied. Applying it to these two cases we find that the facts exhibited by the records before us, fairly viewed, do not make out a case that would authorize the interference of the court in behalf of either appellant Briggs or appellee Beall.

Considering the character and location of their property, its proximity to the two railroads, their depots and shops, running through and located in the town, and to the business portion of the town, the actual and prospective growth of the town, and the propriety under existing conditions of extending the police jurisdiction of the town over the locality, and the benefits and advantages necessarily afforded to and enjoyed by them by reason of the very existence and presence of the municipal government, in common with other citizens and property owners on whom the burden of maintaining it had been cast, it was, in our opinion, reasonable and just to require them and their property to bear a due proportion of the burden.

By forbearing for so many years to assess their property, it is manifest that the municipal authorities were not seeking to foster private interests or to lighten the burden of other taxpayers by extending the boundaries of the town, and when at last they did attempt to subject this property

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to taxation it was under circumstances and conditions that showed that these parties were to be equal sharers with every other property owner in the town of the benefits of the municipal government.

The taxes involved in these cases having been levied and assessed under laws existing before the passage of the act of July 3, 1893, providing for the government of towns of the fifth class, it is not necessary to pass upon any question that might be raised under any of the provisions of that act bearing upon the question of municipal taxation; nor is it necessary for us to determine the effect of the provisions of our present Constitution, requiring that taxes shall be uniform upon all property subject to taxation "within the territorial limits of the authority levying the tax" and prohibiting the exemption from taxation of any property except such as is exempted by the Constitution. (Copeland v. City of St. Joseph, (Mo.), 29 S. W. Rep., 281.)

It is only necessary to say that under the provisions of the Constitution all property not exempted by that instrument is required to be "assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." This plain requirement will prevent exorbitant and arbitrary valuations, and placing more than an equal and just proportion of the public burdens on any tax payer.

Finding no error in the judgment in the case of Briggs, trustee, the judgment is affirmed; but for the reasons given the judgment in the case of appellee Beall is reversed. It is conceded by counsel for the town that only so much of his property as lies between the O. & N. railroad and Greenville "street" or "pike" ought to be subjected to taxation in this proceeding, and the cause is accordingly remanded with directions to so adjudge.

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CASE 80—PETITION EQUITY—JUNE 20

Leonard et al v. Braswell et al.

APPEAL FROM LYON CIRCUIT COURT.

1. DESCENT AND DISTRIBUTION—RIGHT OF THE ISSUE OF VOID MARRIAGE TO INHERIT.—Under the provision of the Kentucky Statute that "the issue of an illegal or void marriage shall, nevertheless, be legitimate," although the marriage was consummated in a State under the laws of which the marriage was void and the issue therefrom illegitimate, the issue of such a marriage may inherit property in Kentucky from their parents and collateral kindred.
2. STATUTORY CONSTRUCTION.—A subsequent section of the statute relative to void marriages which provides that "where the marriage is contracted in good faith, and with the belief of the parties that a former husband or wife then living was dead, the issue of the marriage born or begotten before notice of the mistake, shall be legitimate issue of both parties," does not qualify the previous provision that the issue of an illegal or void marriage shall be legitimate.

L. D. HUSBANDS FOR APPELLANTS.

1. While the State of Kentucky may pass laws of descent and distribution, it is not within the domain of her sovereign power to add to or enlarge the scope or operation of the marriage laws of another State; it takes a marriage in a State whose laws say the issue of such marriage shall be legitimate, to make a legitimate child, and the marriage claimed under by the appellees was absolutely null and void, under the laws of the State where it was consummated. (Kent's Com., vol. 2, side pages 91, 92, 93; Story's Com. Laws, secs. 80a, 81, 87a, 93, 93b, 93d, 93e, 93q, 105, 113, 121; Bishop on Marriage and Divorce, sec. 126, 144, 146; Stevenson v. Gray, 17 B. M., 203.)
2. The law of the State where the marriage is celebrated not only governs and determines the validity or invalidity of the marriage

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itself, but it also governs, determines and fixes the status of the issue of the marriage, and necessarily determines whether the issue of such marriage is legitimate or illegitimate; the laws of other sovereignties can not affect that question. (Smith v. Kelly, 23 Miss. (55 Amer. Dec., 87); McDeed v. McDeed, 67 Ill., 547; Van Vorhees v. Brintnall, 86 N. Y., 18; M. & B. Statutes of Ky., vol. 1, p. 565 and vol. 2, p. 1157.)

3. The provisions of article 1, chapter 47 of the Revised Statutes, title Husband and Wife, and the subsequent revisions of the same, embracing sections 1 to 19 inclusive, have no application whatever to any marriages or the issue of any marriages other than *Kentucky marriages.* The legislature could not regulate, and did not intend to attempt to regulate foreign marriages or the status of the issue of foreign marriages. (Com. v. City of Lexington, 12 B. M., 223; Endlich on Interpretation of Statutes, sec. 174; United States v. Palmer, 3 Wheaton, 630; 23 Amer. & Eng. Enc. of Law, pp. 346-7-8; Van Vorhees v. Brintnall, 86 N. Y., 18; Bishop on Marriage and Divorce, sec. 144.)
4. Evidence of co-habitation, recognition, etc., is competent to prove a marriage in a civil suit. (Sneed v. Ewing, 5 J. J. M., 491; 2 Greenleaf's Evidence, sec. 462; Fenton v. Reed, 4 Johnson, 54; Taylor v. Shemwell, 4 B. M., 577; Crozier v. Gano, 1 Bibb, 257; Stoner v. Boswell, 3 Dana, 232; Donelly v. Donelly, 8. B. M., 116.)
5. The provisions of section 4 of the statute meant to qualify something that was in the third section; that is the legislature intended to make the issue of felonious bigamous marriages illegitimate if the parties married with the guilty knowledge that the former husband or wife was living and not divorced. (Sams v. Sams, 85 Ky., 396; Phillips v. Pope, 10 B. M., 172.)

F. A. WILSON AND J. G. HUSBANDS ON SAME SIDE.

1. While the validity of the Illinois marriage, and the legitimacy of the issue of that marriage, are governed solely by the laws of the that State, yet even under the statute law of Kentucky if the marriage had been solemnized in Kentucky, it would have been bigamous, null and void, and the issue thereof illegitimate, because prior to the begetting of such issue, both Braswell and his so-called second wife knew well the former legal wife was living.
2. A marriage under an assumed name is just as valid for every purpose as if it had been under the right name; and one may be punished for bigamy where the bigamous marriage is contracted under an assumed name, just as if contracted under the true name, and, therefore, it is immaterial that Braswell's first marriage

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was under an assumed name. (Amer. & Eng. Enc. of Law, vol. 16, p. 119, and vol. 2, p. 193; Com. v. Robinson, 6 Bush, 309.)

3. The true rule for the construction of statutes is to look to the whole and every part of the statute and to the apparent intention derived from the whole; to the subject matter; to the effect and consequences, and to the reason and spirit of the law, though the meaning so ascertained conflicts with the legal sense of the words. Effect should be given to each clause when it can be done, but one clause may be enlarged or limited by other provisions on the same subject. (Ryegate v. Wardsboro, 30 Vt., 745, cited in note in vol. 23, p. 307, Amer. & Eng. Enc. of Law; Kent's Com., vol. 1, side page, 462; San Diego v. Gravins, 77 Cal., 511, cited in note in Amer. & Eng. Enc. Law, vol. 23, pp. 309-10.)

WM. H. HOLT ON SAME SIDE.

1. The *lex loci contractus* determines not only the validity of the marriage, but the legitimacy of the issue, and while each sovereign State may make its own laws of descent and distribution, it has no right to say what shall be a valid marriage in another State, or fix the status of the issue of such a marriage. (Story's Conflict of Laws, secs. 80a, 93b, 93e, 93q, 105, 113, 121; McDeed v. McDeed, 67 Ill., 545; Stephenson v. Gray, 17 B. M., 193; Sams v. Sams, 85 Ky., 396; Smith v. Kelley, 23 Miss., 167.)
2. While the law of Illinois must determine the validity of the marriage in this case and the status of the issue thereof, yet even under the Kentucky Statute the marriage was void and the issue illegitimate because the mother knew the father had another wife living before the issue was begotten. (Gen. Stats., chap. 52, sec. 4.)
3. Section 6 of the act under consideration recognizes the *jus gentium* as a part of the law of this State, and the act when considered and construed as a whole was manifestly only intended to apply to Kentucky marriages. The presumption is that it was not intended to have extraterritorial operation.

JAMES & JAMES FOR APPELLEES.

1. The alleged marriage of Charles Braswell under the name of Charles Dobbins to Susan Beloate in Memphis or elsewhere, is not established by the evidence. That was the finding of the lower court, the judge of which knew all the parties and the witnesses, and his finding ought not to be disturbed, "unless flagrantly and palpably wrong and erroneous."

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2. But if the Memphis marriage was established and it was shown that Braswell, while his first wife was living and without being divorced married again, and that the appellees are the issue of the last marriage, still under the Kentucky Statute, they are legitimate and capable of inheriting and transmitting inheritance. Section 2098, Kentucky Statutes, provides that "the issue of an illegal or void marriage shall be legitimate," and this has been the law of Kentucky since 1796, having been brought down to the present through all the revisions of our statute law and has been construed by the courts. (Littell's Digest, chap. 60, title Descent and Distribution, pp. 435-6-7; Gen. Stats., p. 716; Kentucky Stats., sec. 2098; Harris v. Harris, 8 Ky. L. R., 727; Sneed v. Ewing, 5 J. J. M., 460; Workman v. Harold, 8 Ky. L. R., 605; Amer. & Eng. Enc. of Law, vol. 2, p. 142.)
3. N. T. Braswell having died a resident of and domiciled in Kentucky, the laws of descent and distribution of Kentucky must control in the distribution of his personal estate; and all his real estate being situated in Kentucky, its laws must control the distribution thereof. (Sneed v. Ewing, 5 J. J. M., 476; United States v. Crosby, 7 Cranch, 115; Clark v. Graham, 6 Wheaton, 577; Amer. & Eng. Enc. of Law, vol. 24, pp. 363 and 425.)

T. J. WATKINS FOR APPELLEE T. A. BRASWELL.

1. The burden rests upon appellants to establish the marriage in Memphis between Braswell and Miss Beloate; and the court should not bastardize the issue of his subsequent marriage, unless the first marriage is established by such convincing and conclusive evidence as would have convicted Braswell of bigamy if tried on that charge.
2. Even if the evidence was conclusive that Chas. Braswell had a living wife, from whom he had not been divorced, at the time of his marriage to Josephine Doom, still under the statute law of Kentucky "the issue of an illegal or void marriage shall be legitimate," and this statute relates *alone* to the descent and distribution of property, and applies to the issue of *all* marriages, whether contracted in Kentucky or elsewhere. (Act of Va. Legislature, 1785; Act Ky. Legislature, 1796; 1 Stat. Law, 561; Sneed v. Ewing, 5 J. J. M., 460; Jackson v. Moore, 8 Dana, 170; Newcomb v. Newcomb, 13 Bush, 544; Workman v. Harold, 8 Ky. L. R., 605; Harris v. Harris, 85 Ky., 49.)
3. Real estate descends under the laws of descent and distribution of the State where it is located, and personal estate according to the laws of the intestate's domicile at the time of his death. Bras-

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well died domiciled in Kentucky, and all his real estate was in Kentucky, and his whole estate must, therefore, be distributed under the Kentucky laws. (24 Amer. & Eng. Enc. of Law, 425; Towns v. Durbin, 3 Met., 352; Sneed v. Ewing, 5. J. J. M., 460.)

CHARLES K. WHEELER FOR APPELLEES.

1. When an effort is made to bastardize children, every presumption of law and of public policy is in favor of their legitimacy and the courts will *presume* nothing tending to throw a doubt upon it. On the contrary they require the same degree of evidence to bastardize a child as to convict the parent of bigamy.
2. The law of the place where real property is situated determines the mode of its descent. (Sneed v. Ewing, 5 J. J. M., 460; 24th vol. Amer. & Eng. Enc. of Law, p. 426; McNutt v. Logan, Littell's Selected Cases, 60; Thomas v. Tanner, 6 Monroe, 58.)
3. If the Memphis marriage be admitted, and it be admitted that Braswell and his wife both knew his former wife was living before their children were begotten, still the appellees under the statute law of Kentucky, as construed by the courts, can and do inherit from their grandfather. (Sneed v. Ewing, 5 J. J. M., 460; Harris v. Harris, 8 Ky. L. R., 727; Littell & Swigert's Digest of the Laws of Ky., vol. 1, title, "Descent and Distribution," Gen. Stats., chap. 52, art. 1, sec. 4.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

N. T. Braswell lived in the county of Lyon for many years. He died intestate, leaving no children surviving him, but several grandchildren, as well as a large estate. He had but two children, and both of them died before he did. One of his children, Ida, married Leonard, and her children, five in number, are the appellants in this case.

His son, Charles Braswell, at his death left children, and this controversy is between the children of Mrs. Leonard and the children of her brother Charles over the estate left by their grandfather, N. T. Braswell.

The appellants, who are the children of Mrs. Leonard, claim that the children of Charles Braswell (the brother of

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their mother) are the offspring of a void marriage, and, therefore, not entitled to inherit from him or take by descent any part of their grandfather's estate.

The court below adjudged that the children of Ida and Charles Braswell stood in the shoes of their respective parents, and were entitled to inherit what their parents would have taken if living.

The origin of this litigation is based on the following state of facts: Charles Braswell (the father of the appellees) prior to the year 1863 incurred the displeasure of his father, or, for some other reason, left his home, which was in Lyon county, Ky., and took up his residence in Memphis, Tenn., under the assumed name of Charles Dobbins. About the year 1863, and when in Memphis, he married one Susan Beloate, and at the time of the marriage was going under the assumed name of Dobbins. In a short time he deserted his wife, and, after wandering from place to place. in the year 1866, he returned to Lyon county, to his father's home, and there succeeded in winning the affections of a young lady by the name of Josephine Dooms, and, under a promise of marriage, the two left their homes in Lyon county, and going to Cairo, Ill., were married at that place in accordance with the law of the latter State. They immediately returned to their homes in Lyon county, and there lived for many years, having had the two children who are the appellees in this case, and who, after their father's death, lived with their grandfather (the intestate) for some time, the latter dying, as the testimony conduces to show, without ever having known of his son's escapade in Memphis or that he ever had but the one wife, the mother of the children who are the appellees in the present case.

It was argued upon the hearing in this court that Charles

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Braswell (alias Dobbins) never married Susan Beloate, but the testimony in the case upon this point is convincing, and we have no doubt but that a marriage with the Memphis woman took place in the year 1863, and while his sending his second wife back to Memphis shortly after their marriage, and his having been arrested at the instance of her uncle for bigamy and discharged, are facts tending to show that no lawful marriage had taken place, yet there were those who knew Charles Braswell well and attended the wedding, and, connected with other facts and circumstances not necessary to detail, concludes this question.

It seems to have been studiously concealed—this Memphis marriage—as the most intimate friends in Lyon county and the grandfather of these children were all kept in utter ignorance of the events that transpired at Memphis in 1863, or that the father of these appellees ever had but the one wife. They lived in Lyon county, raised these children, and for twenty-five years, and until this suit was instituted, the Memphis marriage was kept concealed, and we are satisfied the mother of the present appellees was not imbued with the belief that her husband had ever married the Memphis woman.

It is claimed by the appellants that the appellees are the offspring of a bigamous marriage, and have no right to inherit one-half or any part of their grandfather's estate, their father having died long before their grandfather.

The law of the State of Illinois, where the last marriage took place, is pleaded, to the effect that the issue of such a marriage were and are illegitimate and without inheritable blood, and the contention is that the *lex loci contractus* governs, not only as to the validity of the marriage but deter-

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mines, once for all, the legitimacy or illegitimacy of the children.

It is conclusively shown that no statute was ever enacted in Illinois providing that the issue of marriages null or void in law shall nevertheless be legitimate, and it will be assumed that the issue of such marriages celebrated in that State are bastards as at the common law, and, the better to understand the argument of able counsel, it is further insisted the law of the State where the marriage takes place must make the offspring legitimate, and if the marriage was null and void by the law of Illinois the children must be held to be illegitimate wherever they go.

We shall not attempt to combat the proposition made by learned counsel that the *lex loci contractus* governs and determines the validity of the marriage, and, if valid when consummated, it must be held valid everywhere; and, if invalid, a like result follows. This doctrine can not be controverted, and the rule must be conceded to be that the law of the place of the marriage will generally govern as to the legitimacy or illegitimacy of the offspring.

There is then no difference between the court and counsel as to this well-settled doctrine, but the appellees maintain they are made legitimate by the Kentucky statute, which reads: "The issue of an illegal or void marriage shall nevertheless be legitimate, except the issue of an incestuous marriage, the marriage between a white person and a negro or mulatto, shall not be legitimate."

That every State has the power and the right to pass its own laws of descent counsel admit, but insists that this applies only where the marriages take place within the borders of the State passing such laws; and, if within its borders,

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can determine the status of the children or their right to inherit.

It seems to us the confusion in this case arises from the failure to distinguish between the validity of a marriage and the right of the offspring of that marriage to inherit from their parents or collateral kindred. The law of the State where the realty is located determines the mode of alienation or descent, and, as to personality, it passes under the law of the domicil of the owner. The State of Kentucky in the exercise of its sovereign power has not attempted by the statute making certain children legitimate to validate marriages that were void where celebrated.

There can be no doubt of the power of the State to enact laws by which bastards may inherit from either father or mother or from both, and this in nowise affects the validity of the marriage contract when entered into either in the State or out of it.

Counsel have cited the case of Smith v. Kelly's heirs, 22 Miss., 167, and the case of McDeed v. McDeed, 67 Ill., 545, tending to establish the principle contended for and in fact the case of Smith v. Kelly's heirs is exactly in accord with his views, but when we look to the history of the statute under which these appellees claim to be legitimate, with the right to inherit from their grandfather and the decisions of this court upon the question, there is left little room for controversy.

The statute on which this claim rests is based on the Virginia statute of 1785, and was embodied in the statute of this State in the year 1796, and made a part of the statute regulating the mode of descent and distribution. It then became a part of the Revised Statutes, and subsequently of the General Statutes, under the title of Husband and Wife, and

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there can be no doubt of its being a statute of descent and distribution, or creating such a status as to children within its provisions by which they may inherit not only from their parents but from collateral kindred.

The law of descent and distribution differs materially in many of the States of the Union, but this does not militate against the doctrine that a marriage, valid where celebrated, is valid anywhere, or, if void, must be so held; but such is not the question involved here. On the contrary, the only question is: Has Kentucky the right to regulate the law of descent or inheritance as to the property of its own citizens where the property is within its own territory?

In the case of Sneed v. Moore, 5 J. J. Mar., 159, it appears that Robert R. Moore lived in the State of Indiana at his death. Dying in that State he left a will that was admitted to probate. He devised a slave and a tract of land in Kentucky to Sneed. When the will was executed Moore was childless, but shortly before his death his wife gave birth to a child, a daughter, and in 1823 this daughter married a man by the name of Ewing. Ewing and his wife claimed the land and slave as the heir at law of her father. Sneed's defense was that she was not legitimate. Mrs. Moore, it seems, when she married Moore had a living husband. Moore's marriage to his wife took place in Kentucky. This court held that under the Kentucky statute, providing "the issue in marriage, deemed null in law, shall, nevertheless, be legitimate," Mrs. Ewing was entitled to the land, its descent being controlled by the law of this State; but as the slave was movable the law of Indiana must control as to his value, that being the domicil of Moore at his death.

The court in that case said, in discussing the effect of the statute: "It is a law of inheritance. It does not operate

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extra territorially so as to legitimate in another State a child who, by the law of that State, would be illegitimate there. This statute would have applied to the land even if the marriage had taken place in Indiana," and further "the law of Kentucky, which declared that issue in marriage, deemed null in law, should be legitimate can be applied only so far as the estate in Kentucky, which descends according to her law, may be concerned."

In the case of Jackson v. Moore and wife, 8 Dana, 170, a provision of this same statute (1796), by which antenuptial children were made legitimate by the subsequent marriage of the parents, this court held the statute to be one of inheritance, and a child made legitimate by its provisions was adjudged to inherit from the brother of her father, his brother dying without children.

The word legitimate, as defined by Webster, means "born in lawful wedlock; to put in position or state of a legitimate person before the law by legal means; as to legitimate a bastard child."

In Harris v. Harris, 85 Ky., 49, a Miss Deacon married one Smith Ash in the State of Ohio (Cincinnati), in August, 1860. In a short time after the marriage she brought an action for a divorce that for some reason was dismissed. While she was the wife of Ash she intermarried with one Harris, the marriage to Harris taking place in Ohio also, but after this last marriage she obtained a divorce from her first husband. We have then both marriages taking place in the State of Ohio, and the testimony showing proceedings for a divorce from the first husband and the birth of several children the offspring of the second marriage.

It was insisted in that case, the marriage being void, the children could not inherit from the father. This court held

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the last marriage void from its inception, but the children were legitimate and entitled to the father's estate by reason of the statute of 1796, that had been embodied in both the Revised and General Statutes, and said: "Where a marriage actually takes place—that is, where it is solemnized according to the forms of law—though void as between the parties the offspring are made legitimate by the statute."

It is, however, contended that section 4 of the Kentucky statute relative to void marriages, was intended to qualify something in the third section, and not to supply what they supposed had been omitted in the third section.

The third section makes in general terms the issue of an illegal or void marriage legitimate, and section 4 provides: "Where the marriage is contracted in good faith and with the belief of the parties that a former husband or wife then living was dead, the issue of the marriage, born or begotten before notice of the mistake, shall be the legitimate issue of both parties."

It is difficult to construe the fourth section as qualifying the third, unless it be said that in all void marriages, after notice of the mistake or the invalidity of the marriage, children begotten after this notice are illegitimate. Such could not have been the legislative meaning, and it is apparent the framers of the statute were fearful that something had been omitted in the third clause that required to be supplied by the fourth, and it is certainly more in accordance with the legislative intent to place this construction on the statute than to make the notice of the mistake on the part of the parents determine the legitimacy or illegitimacy of the children, as said in the case of Sams' administrator v. Sams, 85 Ky., 396, the statute should be construed according to its spirit and reason, and viewed in this light forbids

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the conclusion reached by counsel. The fear of an indictment for bigamy would deter the parties from violating the law, and no harm can result from a construction not only consistent with the object of the Statute but in furtherance of a sound public policy.

Judgment affirmed.

CASE 81—PETITION ORDINARY—JUNE 23.

The Eastern Kentucky Railway Company v. Brown.

APPEAL FROM CLARK CIRCUIT COURT.

1. JURISDICTION.—Although an injunction bond is executed in the Federal courts, upon the dissolution of the injunction, the State courts have jurisdiction of an action on the bond. (Meyers v. Block, 120 U. S., 206.)
2. INJUNCTION BOND—ACTION ON—REMEDY.—It is only where the enforcement of a judgment has been enjoined that the court must at the time the injunction is dissolved ascertain the damages. (Alexander v. Gish, 88 Ky., 13.)

WM. H. HOLT FOR APPELLANT.

1. While the Federal Court in which the bond was executed, upon its dissolution might have, under its practice, assessed the damages against the parties, it did not do so, and left the appellant's only remedy an action on the bond.
2. Upon the dissolution of an injunction where the enforcement of a judgment is enjoined, the court *must* assess the damages against the plaintiff and the assessment is conclusive as to the surety in the bond. (Civil Code, sec. 295; 3 Dana, 437; 7 B. M., 57; 89 Ky.,

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1.) But where the injunction does not stay the enforcement of a judgment, upon its dissolution, the party may sue on the bond for damages without any previous assessment. (Rankins v. Estes, 13 Bush, 428; Logsden v. Willis, 14 Bush, 183; Alexander v. Gish, 88 Ky., 13.)

RODNEY HAGGARD AND EDWARD W. HINES ON SAME SIDE.

1. Although the bond was executed in the Federal Court, the State courts have jurisdiction of an action thereon. (Meyers v. Block, 120 U. S., 206.)
2. An assessment of damages is required as a condition precedent to an action on the bond, only where the enforcement of a *judgment* has been enjoined. (Alexander v. Gish, 88 Ky., 18.)
3. While if the Federal Court had assessed the damages or refused to assess them, its action would have been conclusive, yet its failure to act does not take away the defendant's right of action on the bond. (Russell v. Farley, 105 U. S., 433.)

E. B. WILHOIT ON SAME SIDE.

1. The State courts have jurisdiction of an action on an injunction bond that was executed in the Federal Court. (Meyers v. Block, 120 U. S., 206; Alexander v. Gish, 88 Ky., 13.)
2. The language of the bond providing for the payment of "such damages as may be awarded," means such damages as the court having jurisdiction shall fix and award in an action on the bond after the injunction is dissolved.

BECKNER & JOUETT FOR APPELLEES IN PETITION FOR RE-HEARING.

1. If the court in which the injunction was granted had the power to award damages when it was dissolved, as is conceded, may it not be assumed that the covenant "to pay all such damages as may be *awarded*," was entered into with this power in view, and was intended to do no more than to secure the payment of the damages so awarded by the court. If no damages have been *awarded*, there has been no breach of the bond, and this action was premature. To sustain the appellant's right to sue in this case, is to change the conditions of the bond and to create an obligation such as the surety might not have been willing to enter into and certainly did not contemplate when he executed it. (Ashby v. Chambers, 3 Dana, 437.)

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HOLT & HOLT AND EDWARD W. HINES IN RESPONSE TO THE PETITION FOR RE-HEARING.

1. A recovery in an action on the bond will be an "award" of damages within the meaning of the conditions of the bond. (Hibbard v. McKindley, 28 Ill., 256.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This action is on an injunction bond and a demurrer sustained to the petition. The bond was executed in the United States Circuit Court for Kentucky and by a mandatory injunction the appellant was compelled to deliver to the appellee, Brown, an engine upon which it claimed a lien for repairs. It seems the State court had jurisdicton, although the bond was given in the Federal Court. (Myers v. Block, 120 U. S.) Under the rule in this court or in this State it is only where the enforcement of a judgment has been enjoined that the court at the time must asecrtain the damages. (Alexander v. Gish, 88 Ky.) The demurrer should have been overruled. Reversed and remanded, that that may be done.

CASE 82—PETITION ORDINARY—JUNE 23.

Commonwealth, for use of Clay County v. Howard, &c,

APPEAL FROM CLAY CIRCUIT COURT.

1. COUNTY COURT—MINUTES OF PROCEEDINGS.—Under the provision of the General Statutes, chapter 28, article 17, section 6, with reference to county courts, that "before every adjournment the minutes of the proceedings of the court shall be publicly read by the clerk, and corrected, if necessary, and then the same shall be

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signed by the judge as presiding justice," and the provision of the succeeding section that "no minute or order shall be valid until the same be read and signed," it is not necessary that each day's proceedings shall be read and signed on that particular day; but the court may treat the entire time it is in session as one day and make and sign but one adjourning order. (Dye v. Knox, 1 Bibb, 575; 11 Bush, 238.)

2. SHERIFF'S BOND—VALIDITY OF.—The fact that there is no order of the county court showing that the sheriff executed an official bond does not affect the validity of his bond for the collection of taxes.

TINSLEY & FAULKNER FOR APPELLANT.

1. The law considers the session of a county court as but one day, and the special term of the Clay County Court, beginning 1st day of January, 1890, and extending without adjournment to 4th of January, 1890, when it adjourned and its orders were signed, was but "one day" of the court; and it was not necessary that the minutes of the county court should have been approved the very day the bond was accepted and approved by the court in order to make the bond valid, but it was sufficient if they were approved at the expiration of that term, which was but one day in contemplation of law. (Dye v. Knox, 1 Bibb, 573; Wilson, Receiver, v. Louisville, 93 Ky., 254; Garrard County Court v. McKee, 11 Bush, 236.)
2. Even if the sheriff had failed to qualify by the execution of his official bond, the office would not have been *ipso facto* vacant, but must be so declared by a court of competent jurisdiction; and as no such order was ever made and Howard was recognized as sheriff by the county court, neither he nor his sureties can be heard to complain.

THOMAS H. HINES FOR APPELLEES.

1. There can be no liability upon the part of the sureties in such bonds unless there has been a strict compliance with the requirements of the statute which prescribes what is necessary to bind them. A judicial record should not be binding on sureties without a strict compliance with the statute in the manner and form of making up such record.
2. The county court is a court of record, and can only speak through its records, and in order to make a bond valid the record must

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show its delivery and acceptance. (4 Bush, 307; Fletcher v. Leight, 14 Bush, 301; Com. v. Williams.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This action was instituted in the Clay Circuit Court in the name of the Commonwealth of Kentucky, for the use of Clay county against A. B. Howard, late sheriff of Clay county, and the other-named appellees, his sureties on his bond for the collection of *ad valorem* taxes, authorized to be levied and collected for the use and benefit of Clay county for the year 1890.

It is claimed in the pleadings that the said sheriff had collected the same, and that there was due from him $3,459.90, with interest from the 8th of May, 1893, which he, on proper demand, had failed to pay over. Plaintiff also claims $371 in damages.

Several defenses were relied on, some of which need not be noticed. A jury trial was waived and the law and facts submitted to the court, and the court rendered judgment in appellant's favor against Howard for the sums claimed, but dismissed the action as to the other appellees, and from that judgment, dismissing the action as to the other appellees, who were Howard's sureties, this appeal is prosecuted. A separate finding of law and facts was requested and rendered by the court. Appellants' motion for a new trial was overruled, and a reversal is now insisted on by appellants.

The finding of facts, as stated by the court, in substance show that Howard was elected sheriff for 1890-1, and acted as such during the year 1890, and collected the county dues sued for in this action, but that no valid order of the county court was ever made or signed accepting his bond or approving the bond sued on herein, and no order at all accepting or approving his official bond as sheriff.

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The evidence introduced by the plaintiff shows that the order book of the Clay County Court has a number of entries or orders on it. The commencement reads as follows: "Orders Clay County Court. January special term, 1st day of January, 1890. Present, John S. Reid, P. J. C. C. C." Then follows two orders authorizing different parties to appropriate vacant land, etc.

The next order recites the appearance of A. B. Howard, sheriff of Clay county, with sureties, naming them, and the execution of his revenue bond for 1890, and that the same was approved by the court. The next order recites the appearance of A. B. Howard, sheriff of Clay county, with the appellees as his sureties, and the execution and approval of his bond for the collection of the county levy for 1890. The next entry on the order book is "January, 4th day, 1890." Then follows an order appointing a guardian. The next entry is as follows: "January special term. 4th day of January, 1890. Present J. S. Reid, P. J. C. C. C." Then follows an order allowing some one to enter and appropriate vacant land. The next entry is: "Court adjourned until court in course. John S. Reid, P. J. C. C. C."

All the foregoing orders, except the last one, are on page 286 on Order Book No. 2 of the Clay County Court—the last one is on page 287—and the signature of the judge is at the bottom of said order on page 287.

The witness, who was the county clerk, testified that there was no adjourning order on page 286, and that no other orders are on said pages, and the signature to the adjourning order is the signature of John S. Reid, then county judge of Clay county. Witness also stated that the above-named orders are "all the orders that appear on my order book in

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regard to the bond of A. B. Howard as sheriff for the year 1890."

Appellee quotes sections 6 and 7 of article 17, chapter 28 of the General Statutes, and insists that by virtue of that statute the purported orders of the Clay County Court are nullities, and that inasmuch as no valid bond was executed that the sureties are not liable.

Section 6 reads as follows: "Before every adjournment the minutes of the proceedings of the court shall be publicly read by the clerk and corrected, if necessary, and then the name shall be signed by the judge as presiding justice."

Section 7, *supra*, is as follows: "The minutes shall be taken in a book, and carefully preserved among the records; and no minute or order shall be valid until the same be read and signed."

The court below seems to have been of opinion that the proceedings of each calendar day must of necessity be read and signed, otherwise the same would be invalid, but such is not the law. The statute quoted does not require each day's proceedings to be read and signed.

In Dye v. Knox, 1 Bibb, 575, it was said that "county courts have the power to adjourn from day to day, but they are not required to adjourn each day when they cease to transact business. They may, if they see proper, treat the entire time they are in session as one day, and make and sign but one adjourning order."

The foregoing was approved in Garrard County Court v. McKee, 11 Bush, 238. In the latter case the court said: "In this case the 25th and 30th days of October are treated as one day, or as one continuous session of the court, and the adjourning order and signature of the presiding officer,

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entered on record on the 30th, are a sufficient compliance with the statute."

The entire proceeding of the Clay County Court from the opening of the court the 1st of January, 1890, up to the making and signing of the order of adjournment, must be held to be one day of court. The fact that no order of court appears showing that Howard executed an official bond is not material in this case. If there had been no sheriff the county court could have appointed a collector of the county levy, and taken bond for the performance of that duty.

It is certain that all the bonds required by law to be executed were in fact executed, and the appellees in good faith intended to bind themselves as sureties for the sheriff on the bond sued on, and had no idea but what they were so bound until some time after this suit was brought, and until after defense had been made.

It results from the foregoing that the court below erred in dismissing the petition as to the appellees sued as the sureties of A. B. Howard.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to award plaintiff a new trial and for further proceedings consistent with this opinion.

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CASE 83—AGREED CASE—JUNE 23.

Todd, Mayor, v. Johnson, County Clerk et al.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. VACANCY IN ELECTIVE OFFICE—HOW AND WHEN FILLED.—The provisions of section 2788 of the Kentucky Statutes, in so far as they prescribe how and by what process vacancies in municipal offices may be filled, are in conformity to and meet the requirements of section 160 of the Constitution; but when it comes to providing *a time* at which an election is to be held by the people to fill the vacancy for the unexpired term of an elective office, the provisions of section 152 of the Constitution must control.
2. CONSTITUTIONAL CONSTRUCTION—PRESIDENTIAL ELECTORS ARE STATE OFFICERS.—Presidential electors are "State officers," within the meaning of section 152 of the Constitution, which provides that if the unexpired term of an elective officer does not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and three months intervene before such election, the office shall be filled by appointment until such election, and then the vacancy filled by an election.

JOHN MARSHALL, FAIRLEIGH & STRAUS AND HENRY S. BARKER FOR APPELLANT.

1. The election in November, 1896, is not a "regular municipal election;" the only officials to be elected then who have any sort of connection with the city government are school trustees and they are in no sense city officers. The school board is an independent corporation; has a distinct government of its own; its acts are not the acts of the city and it sues and is sued in its own name; its members are elected under the Constitution and laws, in a different manner from all city officers—it depends upon the city government in only one particular—it derives its revenue therefrom.

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2. Section 160 of the Constitution expressly gave to the legislature the power to provide how vacancies in all municipal offices may be filled, and the language therein is in no sense ambiguous and uncertain, and is not controlled or over-ridden or modified by the general expressions contained in section 152 of the Constitution.
3. But even under the provisions of section 152 the vacancy can only be filled at an election at which either city, town, county, district or State officers are to be elected. The proper construction of that section is that the particular vacancy to be filled must be filled at an election at which officers of the same class are to be elected. (Shelley v. McCulloch, 17 Ky. L. R., 59.)
4. Within the meaning of the Kentucky Constitution presidential electors are not "State officers;" they are officers or functionaries growing out of and created by the Federal Constitution; their election is provided for by that Constitution; they are nowhere referred to in the State Constitution; the State Constitution had no power to have created, abolished or in any way affected their functions; the whole subject is exclusively within the province of the Federal Constitution.

T. L. BURNETT, LYTLE BUCHANAN, ROBT. E. WOODS, PHELPS & THUM AND HUMPHREY & DAVIE FOR APPELLEES.

1. Presidential electors are "State officers;" they are elected by a vote of the people of the State for the purpose of casting the vote of the State in the Electoral College; the State laws prescribe their duties and provide for their compensation. (*In re* Green, 134 U. S., 379; McPherson v. Blacker, 146 U. S., 35; Mason v. State, 55 Ark., 535; McPherson v. Blacker, 92 Mich., 390.)
2. There are also to be elected in the city of Louisville in November, 1896, city school trustees, they being unquestionably city officers; and in providing for their election the charter designates the election at which they are to be elected a "regular municipal election." (Sec. 2949 Ky. Stats.)
3. Where the Constitution provides how a thing shall be done, and directs the legislature to so enact, it is not within the power of the legislature to provide a different mode. (Lowe v. Com., 3 Met., 237; Williams v. Com., 79 Ky., 42.)
4. The provision of section 148 of the Constitution that no officer of any city, town, or county, except members of the city council, shall be elected in the same year in which congressmen are elected, applies only to *regular* elections for full terms of the officers of the classes named. (Berry v. McCulloch, 94 Ky., 247; Shelley v. McCulloch, 17 Ky. Law Rep., 59.)

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ALFRED SELLIGMAN FOR RICHIE, COUNTY JUDGE.

1. The vacancy having been filled more than three months before an election is to occur, at which city, town, district or State officers are to be elected, the appointment fills the office only until the November election, 1896, when the vacancy must be filled by election for the remainder of the term. (Constitution of Kentucky, Sec. 152.)
2. The provisions of section 148 of the Constitution forbidding the election of town and county officers, except members of municipal boards, in the same year representatives in Congress are to be elected, applies only to regular elections for full terms, and not elections to fill vacancies. (Shelley v. McCulloch, 17 Ky. Law Rep., 59.)
3. Presidential electors are "State officers," and are so recognized by the Federal Constitution, in which Congress is given no power over their choice, no right to fix their qualifications or the method of their selection. (*In re* Green, 134 U. S., 389; McPherson v. Blacker, 146 U. S., 135.)
4. School trustees are municipal or district officers who are to be elected at the November election, 1896, within a district co-extensive with that from which the mayor of the city of Louisville is elected.
5. The intention of the framers of the Constitution and the legislators with reference to the filling of vacancies, manifestly was that the complicated election machinery should not be put into operation for the purpose of electing a single officer, but that when such machinery was to be in operation for other purposes, the vacancy should be filled by election.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The death of Henry S. Tyler in January, 1896, caused a vacancy in the office of mayor of the city of Louisville, and the appellant, George D. Todd, was in due time. and as provided by statute, chosen mayor *pro tempore* by the general council.

Whether this temporary election by the council was to fill out the entire unexpired term of Tyler, who had been elected in November, 1893, for four years, or was to provide

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an incumbent only until an election by the people in November, 1896, is the sole question presented on this appeal.

The sections of the Constitution supposed to affect the question are as follows:

"Section 152. Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term." . . . The balance of the section is not involved here.

Section 160, after making certain provisions as to mayors or chief executives, police judges and members of legislative boards or councils of towns and cities, and providing for the election or appointment of other officers of towns and cities, concludes as follows: "The General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

In obedience to the one or the other of these sections, or of both, the General Assembly, in the enactment of a charter for cities of the first class (section 2788, Kentucky Statutes), provided as follows: "When a vacancy shall take place in the office of mayor, a mayor *pro tempore*, shall be chosen by

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the general council, in joint session, by the votes of a majority of the members elected. If the vacancy occur three months or more prior to a regular municipal election, a mayor shall be chosen for the unexpired term at the said election. If the vacancy occur within three months, the mayor *pro tempore* chosen by the general council shall serve until the regular election for mayor. It shall be the duty of the president of the board of aldermen to issue his proclamation for such joint session, to be held not less than ten nor more than twenty days after such vacancy shall take place. Until the vacancy is filled the president of the board of aldermen shall act as mayor."

As there is to be no "regular municipal election" in Louisville in November, 1896, the appellant contends that the vacancy can not be filled then, if the plain letter of the statute be observed; but without regard to the meaning to be given the words "regular municipal election," it seems clear to us that in so far as the statute provides "how" or by what process the vacancy is to be filled, namely, by the action of the general council in joint session and by the votes of a majority of the members elected, etc., it conforms to and meets the requirements of the provisions of section 160, giving the General Assembly the power to provide how such vacancy may be filled. But we think when it comes to providing the time at which an election is to be held by the people to fill the vacancy for the unexpired term of this officer, confessedly "elective" under the Constitution, we must look to section 152 of that instrument; and if the statute changes the time there fixed, so much the worse for the statute, the Constitution must control.

In considering this precise question in Shelly v. McCulloch, 17 Ky. Law Rep., 53, we reached the conclusion that

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the power of the General Assembly was limited to providing how vacancies in elective offices of towns and cities might be filled temporarily, and until an election could be had by the people to fill the unexpired term as provided by section 152. We need not repeat here the reasons there given fully for our conclusions.

However, granting this, the appellant says there is to be, at the November election, 1896, no election "at which either city, town, county, district or State officers" are to be elected, and, therefore, the vacancy can not then be filled; and this brings us to consider the only serious question in this case. There will be elected at that time the electors of president and vice-president, and these, say counsel for the appellees, are "State officers;" and such they undoubtedly are.

The Kentucky Statutes, section 1514, provide for their election—which means an election by the people on a general ticket—on the Tuesday next after the first Monday in November, 1892, and on the same day in every fourth year thereafter. By section 1543 they are required to convene at the capitol of the State on the morning of the second Monday in January after their election, cast their votes and make due return thereof according to law; and for each day an elector so attends (section 1545) he is entitled to receive the same *per diem* and mileage as may at the time be allowed to a member of the General Assembly, to be paid out of the State treasury. He would seem, therefore, to be no more converted into a Federal officer, because he is elected by the people to cast his vote for a presidential candidate, than a member of the General Assembly would be considered a Federal officer because, when elected, he casts his vote for a senator of the United States; for while the latter is sup-

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posed to do more than that, he does that much, and his status as a State officer is not affected.

In *in re* Green, 134 U. S., 379, Mr. Justice Gray said: "By the Constitution of the United States the electors for the president and vice-president in each State are appointed by the State, in such manner as its legislature may direct. . . . (Constitution, article 2, section 2.) The sole function of the presidential electors is to cast, certify and transmit the vote of the State for president and vice-president of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are members of the State legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress." And a conviction in the State court for illegal voting for electors at a regular State election was upheld.

So in McPherson v. Blacker, 146 U. S., 35, where the validity of a State law was attacked as repugnant to the Constitution of the United States because the law provided for the appointment of electors by district elections, the court upheld the State law on the ground that "the legislatures of the several States have exclusive power to direct the manner in which the electors of president and vice-president shall be appointed," and held that they might be appointed by the legislatures directly or by popular vote in districts or by general ticket. "In short," said the court, "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States."

When framing the present Constitution, therefore, its makers had before them the plain provisions of the statutes making these officers "State officers," not in some peculiar or

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qualified sense, but in every conceivable sense, Congress having no control over their election or appointment, but being empowered merely to determine the time when they should be chosen; and they had before them, if that were needed, the decisions of the Supreme Court to this effect.

Why they should be held, therefore, to have intended that the words "State officers," in section 152, should not include these electors—these particular State officers—we can not conceive.

It is said, however, that these officers are not named in the Constitution. This is true, and for the best of reasons. It would have been a wholly useless thing, unless indeed it had been thought desirable to fix permanently the mode of electing such officers. The technical rule of construction which would confine the words "city, town, county, district or State officers" to those officers who had been mentioned in the Constitution, if adopted, would not only override the literal construction of the section, which undeniably includes these electors, but would also set at defiance the well-settled constitutional policy of our State since the abrogation in 1850 of the old Constitution of 1799. And that policy is to refer to the people—the source of all governmental power—the right of filling the offices of their creation with incumbents of their own selection.

The only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business, and when by death, removal, resignation or otherwise an elective office is made vacant, the policy of the law is to give to the people a chance to fill it as soon as practicable.

"The great object in the change in the system," said this court in Speed, &c. v. Crawford, 3 Met., 207, and which is

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emphasized in the well-considered case of Toney v. Harris, 85 Ky., 473, was to refer to the people the choice of their officers of all grades and classes, whether State, district, county, city or town offices. That choice was to be made through the instrumentality of an election.

In Berry v. McCullough, 94 Ky., 247, we had under consideration section 148 of the Constitution in so far as it prohibited the election of city, town or county officers in the same year in which members of Congress are elected. And it was contended that a vacancy in the office of coroner of Jefferson county could not be filled at the election of county officers in 1892. We held that the adoption of such a construction "would stretch the appointive term very far beyond what was even intended or provided for under either the old or the new Constitution," and "construed the prohibition to apply to regular elections only."

The framers of the Constitution were not ignorant of this policy, and they must be supposed to have intended to embrace in the comprehensive language used in the section, viz., city, town, county, district or State officers, all the officers of these divisions and subdivisions, from the highest to the lowest, which were then electible by the people, or which, under any future law, might become so; and to have intended that the occasion of any such election must furnish also the occasion for filling vacancies in any elective office.

It will be observed that the vacancy is to be filled at the "next succeeding *annual* election at which," etc.

The use of the word "annual" is not without significance. It carries with it the idea of an annually recurring election, and one which must, under the scheme devised in the Constitution, recur in every November for all time.

The construction we have adopted gives at least some

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force to this word, for, including presidential elections, the occasions afforded for filling vacancies are largely increased, and elections for that purpose become at least more nearly "annual." Indeed the use of this word gives strong color to the argument of one of our associates that upon the first Tuesday after the first Monday in November of every year the occasion arises for filling any vacancy in an elective office, if it occurs, of course, more than three months before, because no such November can occur when there will not be an election in some of the classes named.

As to odd years there would seem to be no question of the right to hold the elections to fill any vacancy, and in even years there will always either be an election for presidential electors, or a district election for a judge or judges of the Court of Appeals.

Waiving for the present the question of the electors, an illustration of this argument may be drawn from the present situation.

The regular election for a judge of this court from the Fifth district is to be held at approaching November election. There was a vacancy on the bench, caused in February of this year, by the death of our late associate, the lamented John R. Grace, and the argument is that it is most inconceivable to suppose the law makers intended that an election might be held for the purpose of electing a regular judge of this court, and yet not one held at the same regular election to fill a vacancy on the same bench. This view of the matter, however, is not suggested or argued by counsel, and need not, therefore, be considered further than to say that the use of these words," at which either city," etc., would seem to indicate that it was not at every succeeding November election that vacancies might be filled, but only when

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those who were to be elected of the classes named, and hence unless an officer of that class is to be elected the vacancy can not be filled, even if there be an election for members of the lower house of Congress.

Be this as it may, we are convinced that within the meaning and intent of the Constitution vacancies in elective offices may be filled at the succeeding annual election at which electors for president and vice-president are to be elected.

It appears from the agreed facts and from the statute on the subject that a trustee for the Louisville common schools is to be elected in each legislative district of the city, and it is argued that this is an election at which "district officers" are to be elected within the meaning of section 152, and an election, too, in the same territory as that covered in the election for mayor.

This would *seem* to be true, but a determination of that question is not necessary in this case.

The judgment must be affirmed.

Judges Guffy and DuRelle dissenting.

Judge Landes not sitting.

Judge DuRelle delivered the following dissenting opinion in which Judge Guffy concurred.

Henry S. Tyler, mayor of Louisville, died on January 14, 1896, and the appellant, Geo. D. Todd, was thereupon elected mayor by the general council. The election was had under the provisions of the act for the government of cities of the first class, Kentucky statutes, section 2788, as follows: "When a vacancy shall take place in the office of mayor a mayor *pro tempore* shall be chosen by the general council in joint session by the vote of a majority of the members elected. If the vacancy occur three months or more prior to a

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regular municipal election a mayor shall be chosen for the unexpired term at the said election. If the vacancy occur within three months the mayor *pro tempore* chosen by the general council shall serve until the regular election for mayor. It shall be the duty of the president of the board of aldermen to issue the proclamation for such joint session, to be held not less than ten nor more than twenty days after such vacancy shall take place. Until the vacancy is filled the president of the board of aldermen shall act as mayor."

The term for which Mayor Tyler was elected will expire in November, 1897, and the vacancy occurred more than three months before the November election, 1896. As there is to be no "regular municipal election" in November, 1896, as conceded by the opinion of the majority, the plain letter of the statute requires the election to be in November, 1897, unless the Constitution renders the statute inoperative as to the time of holding the election.

It is contended by appellees that the time of holding the election for mayor is controlled by section 152 of the Constitution, because of the fact that in November, 1896, there are to be elected school trustees in the city of Louisville and presidential electors throughout the State.

Section 152 of the Constitution provides: "Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: "If the unexpired term will end at the next succeeding annual election, at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election, at which either city, town, county, district or State officers are to be elected, and if three months intervene be-

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fore said succeeding election, at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term."

The remainder of the section need not be considered here except to note the somewhat striking fact that the "succeeding annual election" is referred to five times in this section, and each time is followed by the qualifying phrase "at which either city, town, county, district or State officers are to be elected."

The questions involved in the case are reduced to these: First, is it "otherwise provided in this Constitution" that the office of mayor may be filled at a different time and in a different manner to be prescribed by the General Assembly from the time and manner prescribed by section 152? Second, if the Constitution has not so otherwise provided—

a. Are school trustees either such city or such district officers within the meaning of section 152 as to control the time of the election of the mayor; and

b. Are presidential electors State officers within the meaning of section 152 of the Constitution?

First, is there a provision otherwise in the Constitution?

Section 160, after making certain provisions as to the mayor and other named officers of municipalities, provides: "The General Assembly shall prescribe the qualification of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

This provision is not ambiguous. It delegates to the legislature the control of the manner in which vacancies in such offices may be filled. But it is insisted that this sec-

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tion does not mean what it says, and that its specific provisions are controlled by the general expression contained in section 152, in spite of the saving clause at the beginning of that section, "except as otherwise provided in this Constitution."

It is further contended that in Shelly v. McCulloch, 17 Ky. Law Rep., 53, this court so decided. There was no statutory provision for filling a vacancy in the office of tax receiver involved in that case, and this court held that the provision of section 152 controlled in the absence of statutory provision. It is freely admitted, however, that the logic of that opinion goes further than the point expressly decided, and while in that case there has been no legislative construction of the meaning of the Constitution, and the court was not there confronted with the question whether an act of the General Assembly was unconstitutional, we do not think we should be justified in dissenting from the opinion of the majority upon this ground alone.

But the remaining questions are a different matter. Leaving the statute out of the question, and assuming that it is unconstitutional and void, we have first the question whether school trustees are officers of cities or districts within the meaning of section 152; and in this connection it may be doubted whether they are officers at all in the strict meaning of the term, and whether they are not, in the view of the Constitution, what their name implies—trustees of their districts for the management of the educational interests thereof, having no other power or duty, and exercising no official functions. The act for the government of cities of the first class, after fully providing for all city officers and for a complete system of city government, enters upon a distinct field, namely, that of education. All the statutory

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provisions on the subject are under the distinct title of "Education," beginning with section 2949, Kentucky Statutes. At the very beginning the school board is created an independent corporation, with a distinct government of its own, responsible for its own acts, making its own contracts, suing and sued in its own name, and from time to time in litigation with the city. Its autonomy is perfect, and the only connection it has with the city government lies in the fact that the city is required to levy, collect and pay over to the school board an annual tax.

A consideration of that portion of the act for the government of cities of the first class relating to the school board leads us to the conclusion that they are not city officers within the meaning of the section of the Constitution under consideration. Their election, moreover, is put by the Constitution upon an entirely different footing from that of city, town, county, district or State officers. By section 155 of the Constitution it is provided that their election shall not be governed by the rules laid down in the Constitution for other elections; it is not required to be, and is not, in fact, held by secret ballot, but under the old *viva voce* method, and the votes are registered by the clerks of the election in separate books provided for that purpose. The very qualifications of the voters may, under the section referred to, be different from the constitutional qualifications for electors of State and other officers, and it is probably competent for the legislature to provide that women shall be entitled to vote at such an election. Their election need not be in November. Generally throughout the State it is held on the first Saturday in June. Both in the cities of the first class and in the county districts it is an annual election (Kentucky Statutes,

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section 4434), and if the construction contended for by appellees on this point, and intimated at the close of the opinion of the majority, be correct, there is no year in which there is not an annual election at which district officers are to be elected. And this would lead logically to the conclusion that vacancies in county offices throughout the State would be required by section 152 to be filled at the annual June election, if that happened to be the next succeeding election before which three months intervened after the vacancy occurred, although this is forbidden by section 148, which requires all such officers to be elected in November. Moreover, the Constitution itself, in section 155, provides that section 152 "shall not apply to the election of school trustees and other common school district elections," thereby excluding those elections from consideration in determining the meaning of section 152. Nor does this case come within the rule laid down in Shelly v. McCulloch, before referred to, for in order to cover the territory embraced in the city of Louisville, throughout which the mayor's election is held, it is necessary to combine seven separate school trustee districts, in each of which there is to be held a distinct and independent election for school trustees. There is no officer to be elected whose electoral district covers the territorial limits of the city. In Shelly v. McCulloch this court said: "Unless the territorial limits of the particular office to be filled were embraced by that of the nearest succeeding election, the rule might be different. For example, a vacancy in a State office would not be filled at a succeeding election in which only city officers were to be elected."

We think the true construction of section 152 probably is that a vacancy in an office can be filled only at an election at which officers of the like class are to be elected; but be that

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as it may, the case of Shelly v. McCulloch does not decide the point contended for by appellees that a number of independent elections can be united to authorize the filling of a vacancy in an office, the election district of which embraces them all. We do not believe that an election in every constable's district in the State would of itself authorize the filling of a vacancy in a State office under section 152. In our opinion the school trustee elections to be held in Louisville in November, 1896, do not make that election one at which either city, district or State officers are to be elected.

And this brings us to consider what is aptly termed in the opinion of the majority "the only serious question in the case." There will be elected in November, 1896, electors for president and vice-president, and these, say the counsel for appellees, are "State officers." In a limited sense they may be so termed, and they have sometimes been described as agents of the State to cast its vote for president and vice-president. But are they officers of the State within themeaning of section 152 of the Kentucky Constitution? They are nowhere mentioned in that instrument. The act which authorizes their election was not authorized thereby. The Kentucky legislature derives its whole power in that regard from the Constitution of the United States. "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress, but no senator or representative or person holding an office of trust or profit under the United States shall be appointed an elector."

The sole power of the State as to the electors is the power of naming them in such a manner as the legislature may direct. The act which provides the mode of selecting elect-

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ors derives its authority not from the Kentucky Constitution but from the Constitution of the United States. When the Constitution of this State provided for the government of the Commonwealth, and the officers who were to administer that government, no officers were in contemplation except those who derived their official capacity from the State constitution, or the laws passed in pursuance thereto. The framers of the instrument and the people who voted to adopt it certainly did not contemplate officers deriving their official existence solely from the Federal Constitution. Electors perform but one function. That done, their power is exhausted. They have no possible power or duty to be exercised or performed in connection with the government created by the Constitution of Kentucky. They are not State officers within the meaning of section 152.

Much stress was laid by counsel for appellees upon the United States Supreme Court cases of *in re* Green, 134 U. S., 377, and McPherson v. Blacker, 146 U. S., 1, as holding that presidential electors were State officers, but the cases do not support that contention. The Green case decided that as the Federal Constitution had delegated the mode of selection to the State Legislature, and the legislature had determined that it should be done by election by the people, the State courts had jurisdiction to punish an offense committed at such election against the State election laws.

The court in that case said of the question whether the State had concurrent power with the United States to punish fraudulent voting for representative in Congress: "It may be that it has."

Neither that case nor the Blacker case anywhere decide that electors are State officers. The latter case arose from the Michigan legislature providing for the election of the

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electors by districts, and it was held that as the United States Constitution gave the power of determining the mode of selection to the State legislature, the legislature might exercise that power in any way it saw fit, and might provide for the selection of electors upon a State ticket, voted for throughout the State, or by elections by districts, or by election by the legislature. In this State down as late as 1824 presidential electors were selected by the legislature.

But in no just sense does either of the words officer or agent of the State describe the powers and duties of presidential electors. They are best described by the word used in the Constitution. They are electors, a body of men to each of whom, when appointed by the State, the Federal Constitution gives the power to cast, not the vote of the State, but his own vote for president and vice-president. It may be conceded that when the State legislature provides for their appointment by a vote of the people, under the power given by the Federal Constitution, that election is held under the power and subject to the control of the State, and frauds in its conduct may be punished by the State laws. "In short," as said in the Blacker case, "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Justice Gray in *in re* Green, 134 U. S., 377-379, 'no more officers or agents of the United States than are the members of the State legislature when acting as electors of Federal senators, or the people of the States when acting as the electors of representatives in Congress.'"

On the other hand it may be said with equal truth that when appointed and exercising their only power they are no more officers or agents of the State than are the free electors of Kentucky when, under the section of the Kentucky Con-

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stitution, they cast their votes for governor of the Commonwealth. They are independent electors. "As originally adopted and as it now exists, it was supposed that the body of electors interposed between the State legislature and the presidential office would exercise a reasonable independence and fair judgment in the selection of the chief executive of the national government, and that thus the evil of a president selected by immediate popular suffrage on the one side, and the opposite evil of an election by the direct vote of the States in their legislative bodies on the other, would both be avoided." (Miller on Constitutional Law, 149; Rawle on Constitution, 55; Story on Constitution, section 1473; The Federalist, No. 68.)

It is true that in practice they have come to be mere "puppets, selected under a moral restraint to vote for some particular person who represents the preference of the appointing power, whether that was the legislature or the more popular suffrage by which the legislature itself was elected." (*Ibid*, page 149.)

But their power under the Constitution still remains, and we can not concede that they have ceased to be independent electors because they have in practice ceased to act independently, or that they have become mere officers or agents of the State, charged with any official power or duty to register the will of the majority of the voters in the election of president and vice-president because, under the moral restraint referred to, they have come to act as if they were.

In casting their votes for president and vice-president they do not act as representatives of the States, but, if representatives at all, they represent the people of the United States in the electoral college. They do not cast the vote of the State, but their own votes as electors.

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"The Constitution," says Chancellor Kent, 1 Kent, 275, "from an enlightened view of all the difficulties that attend the subject, has not thought it safe or prudent to refer the election of president directly and immediately to the people, but it has confided the power to a small body of electors appointed in each State under the direction of the legislature."

It is only in the event that the electoral college fails to elect, and the election is thereby thrown into the house of representatives that the States are represented in voting for a president, or the votes of the States as States are cast. In our judgment electors are not officers within the meaning of the Kentucky Constitution.

So far as the intent of the Constitutional Convention can be shown by the debates which took place among the members, it can be demonstrated that that body was influenced by a strong desire to separate, as far as possible, Federal elections from those of the State, through fear of Federal interference, but we do not attach much importance to arguments drawn from such evidence. We base our views upon the language which the framers of the Constitution used, and the sense in which the words must have been understood, not only by the members of the convention but by the people by whose suffrages the instrument was made the Constitution of Kentucky. To say that the overwhelming majority of the voters of Kentucky understand an election for presidential electors to be a Federal election, and not an election of State officers, is to understate the proposition. The percentage of the people who understand or think of it otherwise is infinitesimal, and it is the understanding of the people who voted for the adoption of the instrument which should control in its construction. This canon of constitutional construction is too well settled to require the citation

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of authority. Nor can we concur in the conclusion of the majority that the election of a judge of the Court of Appeals in another district is an annual election at which a vacancy in the office of mayor of the city of Louisville can be filled. The conclusion of the majority completely nullifies the qualifying words of the phrase "succeeding annual election, at which either city, town, county, district or State officers are to be elected," which, with painful particularity and emphasis, are reiterated no less than five times in section 152; and the policy of the adoption of the Constitution of 1850 should have nothing to do with the construction of the presen Constitution.

It must be assumed that the new Constitution was intended to effect a change of policy in every respect in which the language used indicates a different purpose from that used in the former instrument. Constitutional conventions are not held nor are Constitutions adopted for the purpose of perpetuating governmental policies, but for the purpose of changing them. A new Constitution is a new departure; and so the policy of the Constitution of 1850, to refer all matters to the vote of the people as quickly as possible, can have no place in the construction of the language of section 152 of the present Constitution, which indicates in five separate places an intention to alter or qualify that policy.

In our opinion it was a matter of little importance whether the Constitution should fix the time of filling the vacancy in one year or another, but we deem it of great importance that the correct rule of constitutional construction be adopted by this court.

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CASE 84—PETITION EQUITY—JUNE 23.

Finnell's Administrator v. The Louisville Southern Railroad Company.

APPEAL FROM MERCER CIRCUIT COURT.

1. VENDOR'S LIEN—RAILROAD CONSTRUCTION ON THE PROPERTY IN LIEN.—Where the vendee of land gives his consent for the construction of a railroad over the land, and subsequent to the building of the railroad the vendor brings a suit to foreclose his purchase-money lien on the property to which the company was a defendant, and the court orders the sale of all the tract, except that which constitutes the roadbed, with a proviso that if that failed to bring the amount of the debt the balance would be made out of the road bed, it was proper for the court to then permit the company to file its cross-petition so as to enable the court to determine the mode in which the roadway should be disposed of or the company made to account for its value.
2. SALE OF ROADBED FOR PURCHASE-MONEY LIEN.—In such a case, where the land outside of the right of way was insufficient to pay the lien debt, the right of way with the improvements thereon should not be sold to satisfy the lien for the balance of the debt; but the right of way should be condemned and the value thereof, together with the damages to the rest of the tract, should be adjudged against the railroad company, with a lien upon the roadbed to secure it.

BELL & BELL FOR APPELLANT.

1. Although the railroad company was a purchaser, it had no right to hold this land against the unpaid purchase-money lien, unless the lien-holders were guilty of some conduct that amounted to an estoppel. (Holloway v. Louisville, &c., Ry. Co., 92 Ky., 246; Louisville, &c., Ry. Co. v. Hess, 92 Ky., 410.)
2. The judgment of the circuit court at the November term, 1887, adjudging that the whole tract of land, including the roadbed, was

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in lien for the unpaid purchase money, is in full force and binding on the parties, never having been reversed, superseded or set aside.

3. The attempted condemnation proceedings were void, because the court had no jurisdiction; the statute in force at that time gave the county courts exclusive, original jurisdiction in such proceedings. (Gen. Stats., ed., 1887, chap. 18, secs. 1, 2, 3 and 4.)

BULLITT & SHEILDS FOR APPELLEE.

1. The judgment entered November 18, 1887, was, as to the Louisville Southern R. Co., not final, but interlocutory; consequently, it remained under the control of the court when the judgment of November 21, 1889, was entered. The judgment of 1887 did not adjudge a sale of the roadbed, it only adjudged that there was a lien upon it.
2. The judgment of November 21, 1889, can not be reversed by this court, because, although in nature and effect a final decree, yet,
   (1.) It has never been appealed from, and
   (2.) If an appeal by construction be allowed, it is barred by limitation.
3. The judgment of November 18, 1887, standing alone is not valid or binding upon the Louisville Southern Railroad Company; as to that company it is void because no specific relief against it is sought in the pleadings. (Civil Code, sec. 90.)
4. The proceeding by the court to ascertain the value of the right of way was proper; the property was already under the jurisdiction of the court, and it avoided circuity of action. Besides, neither Vanarsdale nor any of the heirs of J. W. Finnell objected or excepted to the order or judgment directing condemnation proceedings.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

John W. Finnell owned a tract of 352 acres of land in the county of Mercer, and by an executory contract (in writing) sold it to Jackson Vanarsdall and John H. Finnell for $12,300. Vanarsdall purchased of John H. Finnell his interest and took possession of the land under this purchase. The vendor, John W. Finnell, having died, and the purchase money not having been paid, his personal representative,

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W. H. Terhune, instituted this action to enforce the lien of the vendor. After this sale to Vanarsdall, who was in possession and the equitable owner, the Southern Railroad was constructed over a part of this land, and having been made a defendant to the action the company was allowed to make defense, or by an answer and cross petition to set up its claim to the right of way under the Vanarsdall agreement. It seems that this pleading on the part of the railway company was filed or permitted to be filed after a judgment had been rendered to sell the property. That judgment directed the land on either side of the railway to be first sold, with this proviso: That if the land at the sale fails to bring the debt the court will then proceed to make the unpaid purchase money out of it; viz. the said roadway. We do not see that the filing of the cross pleading by the railway was an error on the part of the court, as it might well determine the mode in which this roadway should be disposed of or the company made to account for its full value. The commissioner sold the land on both sides of the right of way, and it lacked $6,000 of satisfying the vendor's lien, and now it is insisted that this right of way, with the improvements upon it in the way of rails, etc., should be sold to satisfy the lien yet due. It seems the court refused to sell the roadbed, but undertook to have it condemned by ascertaining the actual value of the land taken and the damage to the tract by reason of the taking. The jury fixed the value of the land at $100 and the damages at $350, making in all $450, and for this sum gave a judgment.

It is argued by counsel for the appellant that the chancellor was without jurisdiction to have this land condemned, as under our statute there is but one way the land could be condemned, and that was by the Mercer County Court.

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The land had, in fact, not been condemned, but the entry and building of this great public way was made by the consent of the owner and the party in possession. There was no appropriation of property without the consent of the owner, or any injustice to the vendor by reason of giving to him the full value and more than the full value of the land in discharge of his lien. It is evident the chancellor would, under the circumstances, permit the company to remove its track and leave the land unaffected by the presence of the road upon it, and if this equitable right exists in what way is the party seeking to enforce his lien injured, when he obtains twice as much as the land is worth? This not being a wrongful entry, the party is not in the light of a trespasser as in the case of Holloway v. Louisville, &c., Railway Co., 92 Ky., 244, where an ejectment was maintained becase of the wrongful entry, but a case is presented in a court of equity where an equitable adjustment becomes necessary, and to prevent a sale of that in which the public has an interest, and the sacrifice of the property of the appellee.

The argument that the way and the only way to test the value is by a public sale of the tract is fallacious, as there can be no doubt but that on the facts the party would be allowed to remove the bed of his road, with the rails, etc., and no chancellor ought or would permit a great line of railway to be severed in this manner where the right to enter on the land existed, and where a court of equity can so adjudge as to fully compensate the holder of the lien. If the chancellor had withheld his judgment until proceedings could have been had in the county court the same objections would be urged, and where it is plain the appellant has received all and more than he is entitled to, if the

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judgment below is enforced, it should stand. The only error is in rendering a judgment without creating a lien to that extent upon the company's roadbed.

The judgment is reversed, with directions to enter a judgment requiring the payment of this money within a fixed period(say twenty days) or the lien will be enforced.

CASE 85—PETITION ORDINARY—JUNE 24.

Courts v. Louisville & Nashville Railroad Company.

APPEAL FROM MARION CIRCUIT COURT.

1. CARRIERS—PASSENGER—EXCESSIVE CHARGE—MEASURE OF DAMAGES.—Where one applies to a railroad ticket agent for a ticket to a certain station, and the agent believing that the train about to go did not stop at that station, refused to sell it to him,and he boards the train, and the conductor in accordance with the rules of the company charges him extra fare because he had no ticket, there being nothing in the pleadings or evidence to show that either the agent or conductor acted in other than good faith and according to orders, or that the latter was insulting or abusive, the measure of damages was the difference between the regular fare and what the conductor collected; and an instruction as to punitive damages was properly refused.

W. E. RUSSELL & SONS FOR APPELLANT.

1. When the act complained of is accompanied by circumstances of aggravation, punitive damages may be recovered. In this case the conductor knew that the agent had refused to sell the appel-

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lant a ticket, and yet wilfully, wrongfully and deliberately charged appellant the extra fare, because he had no ticket. (5 Bush, 213; 2 Met., 147.)

W. J. LISLE FOR APPELLEE.

1. The appellant suffered no loss of time or inconvenience; the ticket agent and conductor were both plainly discharging their duties (the agent only being mistaken as to the effect of an order), according to their orders without intention of doing wrong; under these circumstances no punitive damages should be allowed. (L. & N. R. Co. v. Storms, 15 Ky. Law Rep., 333.)

THOMPSON & McCHORD AND H. W. BRUCE OF COUNSEL ON SAME SIDE.

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

This was an action to recover from the appellee damages for compelling appellant to pay more than regular fare from Lebanon to Chicago Station on the Knoxville Branch of the appellee's railroad.

Appellant boarded passenger train No. 26 that passed Lebanon regularly about 5 o'clock in the morning on the 11th day of September, 1893, for the purpose of going to Chicago Station, where he was engaged as a hand at a brickyard, without having a ticket for the passage. The regular ticket fare between the two points was 36 cents. He applied to the ticket agent at Lebanon for a ticket, but the agent refused to sell it to him because Chicago was not a regular stop station for that train. Not having a ticket the conductor, under the rules of the company, required him to pay 47 cents for his passage, which was 11 cents more than the regular ticket rate, the distance being 12 miles. He objected to paying the extra charge, urging as a reason that he had applied to the ticket agent at Lebanon for a

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ticket and he refused to sell it to him. His objection was of no avail and he had to pay the train rate.

It appears from the evidence that some time before this occurrence orders had been given by the proper officials to take up passengers on train No. 26, at Chicago until further orders. But it also clearly appears that both the ticket agent and the conductor were acting in good faith, and within what they believed to be the orders of their superiors, and according to the rules of the company, the one in refusing to sell a ticket to the appellant for that train and the other in requiring him to pay the extra or train fare.

It further appears from the evidence that after the train stopped at Lebanon on that morning the conductor discovered the appellant and another attempting to board the train by getting on at the front platform of the baggage car, and that he required them to enter a passenger car instead, and that the incident excited a suspicion that they were endeavoring to avoid paying fare, and that when he collected fare from the appellant he reminded him of this, and expressed his suspicion that he had tried to avoid paying fare. This being substantially the state of facts brought out in the evidence, the court instructed the jury that if the order was given to stop train No. 26 at Chicago Station, which was not a regular stop station for that train, and the ticket agent refused to sell a ticket to the appellant to that point for that trip, and he was required to pay, and did pay the conductor on the train more than the regular rate for a ticket from Lebanon to Chicago Station, the appellant was entitled to the difference between the amount paid and the regular ticket rate, and that they should so find. At the same time the court refused to give an instruction requested by counsel for the appellant that the

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jury were not confined in estimating the damages, if any, to the difference between the regular ticket fare and the train rate, but that they might, in addition thereto, give punitive damages. The jury having found a verdict for the appellant for 11 cents, the difference between the two rates of fare, for which a judgment was rendered, and the court having refused to grant a new trial, the case is brought before us on appeal.

The only error for which a reversal is sought is the refusal of the court to give the instruction allowing punitive damages to be assessed. But after a careful examination of the case we have not been able to discover any fact brought out that would have justified an instruction of the kind. In the first place, it is not clear that the allegations of the petition were sufficient to authorize anything more than actual or compensatory damages. The substance of the case as stated in the petition is that the appellant applied to the ticket agent for a ticket to Chicago Station; that the agent refused to sell him the ticket, the regular fare being only 36 cents; that he boarded the train without a ticket, and was compelled and required by the conductor to pay 47 cents, which he paid under protest, and went on, as his business required him to go on that train; that extortion was thus perpetrated, whereby he was harassed, vexed and humiliated.

Under the law the relief sought and adjudged must be based on the facts stated in the pleadings of the party seeking the relief. But here there is no allegation of fact showing that the conductor ought not to have required the payment of the 47 cents that was paid, or showing that he acted arbitrarily or in an insulting or abusive manner, or in such a way as to harass or humiliate the appellant, upon which

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to base a recovery of any more than actual damages. But aside from this the evidence fails to show any fact that would have warranted the court in submitting any question besides that of compensation to the appellant for what seems to have been an honest mistake on the part of the ticket agent and conductor, whereby the appellant was required to pay more than the regular ticket fare for that trip. And the jury having allowed the difference between the regular ticket fare and the train fare which he was required to pay, which carried the costs with it, the appellant has recovered all that the facts alleged or proved show he was entitled to, and finding no error the judgment is affirmed.

CASE 86—PETITION ORDINARY—JUNE 24.

Louisville Insurance Company v. Monarch et al.

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APPEAL FROM DAVEISS CIRCUIT COURT.

1. EVIDENCE—STATEMENTS OF AGENT.—In an action on a policy of marine insurance, the testimony of one of the plaintiffs as to what the general agent of the company had said to him about certain information he had from another agent of the company who had been sent to the scene of the wreck with a view to recovering the cargo was competent.
2. EVIDENCE.—The written evidence of witnesses taken before the hull inspectors, upon an investigation of the facts attending the disaster is not evidence against the insured, they being no parties to the investigation.

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3. MARINE INSURANCE—EVIDENCE.—The company can not defeat a recovery on a policy of marine insurance, because the number of the crew was not as large as that designated in the license, it appearing by the evidence that the boat had a sufficient number of officers and men to make the trip; and, especially, where there was no evidence even tending to show that the sinking of the boat resulted from an insufficient crew.

4. EVIDENCE.—Where the company was trying to show that the boat was unseaworthy because of the defective condition of the hull, the evidence of the captain of the boat, whose experience gave him a knowledge of such matters, that the boat might strike an obstruction and the contact not be felt or noticed by those on board, was competent.

5. EVIDENCE.—It being charged in the answer that the boat was sunk because of the willful and fraudulent misconduct of the owners and officers of the boat, evidence of the value of the boat and that she was not insured was competent to show lack of motive to destroy it.

6. EVIDENCE—RECALLING A PARTY TO THE SUIT TO TESTIFY.—It is within the discretion of the trial court to determine whether, after a party to the action has testified in chief and then introduced other testimony in chief, he may be recalled and give other testimony which he might have given in chief.

7. PRACTICE—AMENDED PLEADING.—Where the allegations of an amended pleading offered at the close of the evidence on the trial, do not disclose anything which the party offering it may not have known before by the exercise of reasonable diligence, and do not conform to the proof, the court properly refused to permit it to be filed.

8. MARINE INSURANCE—CONDUCT OF OWNER AND OFFICERS OF BOAT.—The mere negligence of the owners of a boat or the officers in charge of it is no defense by an insurance company to a marine policy on the cargo. The only misconduct of the masters and officers which would defeat a recovery on the policy is fraud or design; although the policy insures against the unavoidable dangers of the river, that provision relates to the peril embraced by the policy and not to the skill or care to be exercised by those in charge of the boat.

9. WHEN INSURED MAY ABANDON SUBMERGED CARGO—EXPENSE OF ATTEMPTED RECOVERY.—It appearing that the insurance company had made preparations to recover the property, but was prevented by a rise in the river, which lasted two months, at which time it decided not to attempt the recovery and notified the insured that it denied liability on the policy, the cargo being of a

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character to be destroyed by the action of the water upon it, the insured was justified in abandoning the submerged cargo; and was not liable for any part of the expense incurred by the company in its preparations to recover it.

10. PARTIAL LOSS—RIGHTS OF INSURER.—In an action on a marine insurance policy for a total loss, where the answer denies there was a total loss, and it appears from the evidence that part of the insured cargo was recovered by the owners, the company is entitled to a reduction of the amount of the insurance in proportion to the value of the property recovered, less the expense incurred by the owners in its recovery.

11. PRACTICE ON REVERSAL.—The jury having passed upon the liability of the company on the policy, and it having had its opportunity to contradict the evidence as to the property recovered and its value, and there being no conflict in the evidence on that point, and that being the only point upon which the judgment is reversed, this court will not order a new trial, but will direct the proper judgment to be entered.

BARNETT, MILLER & BARNETT FOR APPELLANT.

1. The court erred in permitting the plaintiff, Cate, to tell, upon his re-direct examination, what Captain Harpham had said to witness about the wreck after he had left it. Such evidence was collateral to the issues involved. (Greenleaf on Evidence, sec. 52; Bibb v. Prather, 1 Bibb, 316; Starkie on Evidence, vol. 2, star p. 222.)
2. It was error to permit the plaintiff, Monarch, to tell, when re-called, what Captain Harpham had said to Shallcross, as neither of them had authority to bind the defendant. (Greenleaf on Evidence, secs. 113 and 124; Meacham on Agency, secs. 6 and 288; Story on Agency, sec. 17; Smith's Mercantile Law, sec. 174; Kent's Commentaries, vol. 2, star pp. 620-1.)
3. The court erred in permitting the alleged copy of the certificate of inspection and license of the "George Strecker" to be read in evidence, it being and purporting to be nothing more than a copy. (Kentucky Statutes, sec. 1636.)
4. The court erred in refusing to permit the defendant to read in evidence copies of the testimony of Gilmour, Gross, Hatcher, Cate, Sauerhaber, Birk, Berganroth and Johnson on file in the office of the hull inspectors.
5. It was error to permit the absent witness Crammond to contradict the boat's official license and give his opinion that the boat had a sufficient number of officers and men in making the trip.
6. The court erred in permitting the witness, Crammond, who was

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not present at the accident and had not seen the boat loaded, to give his opinion that the boat might strike an obstruction and the contact not be perceivable to those on board.

7. It was error and misleading for the court to permit the witness, Crammond, the owner of the boat, to testify that the *boat* was not insured. There was no such issue, and the evidence was irrelevant. (Greenleaf on Evidence, sec. 52; Standard Oil Co. v. Tierney, 92 Ky., 378; Best on Evidence, sec. 644.)
8. The court erred again in permitting the witness, Crammond, the owner of the boat, to testify that the *boat* was worth $5,000 at the time it was lost.
9. The trial court again erred in permitting the plaintiff, James Cate, to be recalled and to testify for himself in chief, after having introduced other testimony for himself in chief. (Code, sec. 606, sub-sec. 4; Allison v. Moore, 3 Ky. Law Rep., 326; Beall v. Bethel's adm'r, 3 Ky. Law Rep., 693; McKee v. Maggard, 13 Ky. Law Rep., 304; Mt. Sterling & O. T. P. Co. v. Hamilton, 14 Ky. Law Rep., 720; Freeman's adm'r v. Deer Bros., 14 Ky. Law Rep., 813.)
10. It was error to permit the plaintiff, Cate, when recalled in chief, to testify as to what Harpham told him about reclaiming the property, and as to what plaintiffs had done in that behalf.
11. The trial court erred in overruling defendant's motion to exclude from the jury evidence as to the qualification, character or general reputation of the plaintiff's witnesses, Gross, Crammond and Berganroth, either as steamboatmen, mate, pilot, navigator, or officer, of any steamboat, said evidence being too general and not applicable to the "George Strecker."
12. The trial court also erred in overruling defendant's motion to instruct the jury to find for the defendant at the conclusion of the plaintiff's evidence.
13. The trial court erred in refusing to allow the amended answer tendered February 11, 1893, to be filed. (Civil Code, sec. 134; Rogers v. Rogers, 15 B. Mon., 377; Karney v. City of Covington, 1. Met., 339; Gibson's adm'r v. Smith 3 Ky. Law Rep., 332; Wade v. Moore, 3 Ky. Law Rep., 392; Miller v. Withers, 3 Ky. Law Rep., 57; Fannin v. Murray, 3 Ky. Law Rep., 251; Willis v. McNeal's adm'r, 8 Ky. Law Rep., 411; Howard v. Crisp, 9 Ky. Law Rep., 722; McFarland v. Benton, 10 Ky. Law Rep., 873; Northwestern Ins. Co. v. Davis, 12 Ky. Law Rep., 843; Caldwell v. Atwater, 15 Ky. Law Rep., 570; Greer v. City of Covington, 83 Ky., 416; National Mut. B. Ass. v. Jones, 84 Ky., 113; Fibin's adm'r v. C & O. R. Co., 91 Ky., 446; Carter v. West, 93 Ky., 213; Louisville Underwriters v. Pence, 93 Ky., 100.)

"That a court possesses the power to allow any amendments in

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the pleadings while a case is depending, is not to be questioned; and this power is liberally exercised both in courts of equity and common law, for the furtherance of justice. Perhaps the legal discretion which exists in the case, acknowledges no other limit than is necessary for its purposes of justice, and for the restraint of gross and inexcusable negligence." (Chief Justice Marshall in Callaway v. Dobson, 1 Brock., 121.)

14. The court erred in not permitting the second amended answer tendered on February 13, 1893, to be filed.
15. The court erred in sustaining plaintiff's demurrer to the third paragraph of the rejoinder.
16. As the plaintiff recovered and kept a large part of the goods there was no legal or actual abandonment of the insured goods. (Louisville Underwriters v. Pence, 93 Ky., 99; Curtin v. Phoenix Ins. Co., 1 Wash., 400; Columbian Ins. Co. v. Ashby, 4 Peters, 139; Patapsco Ins. Co. v. Southgate, 15 Pet., 624; Comeggys v. Vasse, 1 Pet., 214; Marshall on Insurance, B. 1, a, 14; Park on Insurance, ch. 9, pp. 228-279.)
17. There was neither an actual nor a constructive total loss and the verdict for the full amount of the policy was both excessive and contrary to law. (Louisville Underwriters v. Pence, 93 Ky., 106; Hugg v. Augusta Ins. & Banking Co., 7 Howard, 595; Park on Marine Ins., c., b., subd., p. 247; 2 Phillips on Ins., c. 18, p. 483; 3 Kent's Com., 295-296; McGrath v. Church, 1 Caines, 196; Neilson v. Col. Ins. Co., 3, id., 108; LeRoy v. Gouverneur, 1 Johns, Cas., 226; Griswold v. New York Ins. Co., 1 Johns, 205; Livingston, J. S. C., 3 id., 321; Saltus v. Ocean Ins. Co., 14 id., 138; Whitney v. N. Y. Firemen Ins. Co., 18, id., 208; Brook v. Loua. St. Ins. Co., 4 Martin, N. S., 640; S. C., 5, id., 530; Moreau v. U. S. Ins. Co., 1 Wheat., 219 (ss. 891-2, *supra*); McGaw v. Ocean Ins. Co., 23 Pick., 405; 3 Summ., 544; 1 Story, 342; Cockring v. Fraser, 4 Doug., 295; 1 Park, 249; Taney's Decisions, 159; Byais v. Chesapeake I. Co., 7 Cranch, 415; Mariardier v. Chesapeake Ins. Co., 8 Cranch, 47; Neilson v. Columbian Ins. Co., 1 Caines, 108; Anderson v. Same, 3 Caines, 108; Myers Fed. Decisions, vol. 19, "Insurance;" Great Western Ins. Co. v. Fogarty, 19 Wall., 640.)
18. The plaintiff warranted that the boat was seaworthy when she left Rumsey. The court erred in defining "seaworthiness" as contained in instruction No. 4. She did not have a *sufficient crew* and was not *properly loaded*. (Richards on Insurance, secs. 99, 100, 101; Lord v. G. N. & P. Ins. Co., 4 Sawyer, 292; "The Vincensse," 3 Ware, 171; Parsons on Marine Insurance, p. 379; Rugley v. Sun M. Ins. Co., 7 Loua. Ann., 279; Miller v. S. C. Ins. Co., 2 McCor., 336 (13 Am. Dec., 734); Walsh v. Washington Ins. Co., 2 Am. Dec.;

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Seaman v. Enterprise F. & M. Ins. Co., 21 Fed. Rep., 780; Prescott v. Union Ins. Co., 1 Wharton, 399 (30 Am. Dec., 207); 2 Phillips on Insurance, sec, 2079; Snethan v. Ins. Co., 3 Lou. Ann., 474; Talcott v. Ins. Co., 2 Johnson, 125; Work v. Leathers, 7 Otto, 379; Tidmarsh v. Washington F. & M. Ins. Co., 4 Mason, 439; Silva v. Low, 1 Johns Cas., 198; Low v. Hollingsworth, 7 T. R., 160; Dixon v. Sadley, 5 M. & W., 414; Patrick v. Hallett, 1 Johns., 248.)

19. The officers of the boat were guilty of the grossest misconduct, and were guilty of barratry, which was not one of the perils insured against. (Levi v. N. O. Ins. Ass., 2 Wood, 63; Citizens Ins. Co. v. Marsh., 41 Pa. St., 386; Flanders on Insurance, 2 ed., 553; Johnson v. Berkshire I. Co., 4 Allen, 388; Phoenix Ins. Co. v. Cochran, 51 Pa. St., 148; Chandler v. Worcester Ins. Co., 3 Cush., 328; Goodman v. Harvey, 4 Ad. & El., 870.)

20. The court erred in instructing the jury that it should find the full amount of the policy, and in refusing to direct the jury to give a credit for the sum expended by the defendant, and also for the value of the recovered property. (14 Am. & Eng. Enc. of Law; Mobile M. D. & I. Co. v. McMillian, 27 Aa., 27; Breed v. Providence & Wash. Ins. Co., 17 Blatch., 287.)

C. S. WALKER AND WALTER EVANS OF COUNSEL ON SAME SIDE.

FAIRLEIGH & STRAUS FOR APPELLEES.

1. The statement of the special agent of the insurance company who was sent by it to examine the wreck and take steps to rescue the property, as to the condition of the wreck after he had viewed it, was competent evidence against the company; and if not the evidence was not hurtful to the company and it can not complain.
2. The statements of the general agent of the company to one of the plaintiffs bearing on the issues as to whether notice of loss had been given and a waiver of notice by the company, and whether there had been an abandonment or waiver of abandonment, were certainly competent evidence against the company.
3. A copy of the certificate of inspection of the steamer carrying the cargo was certainly pertinent to the issue of seaworthiness raised by the company, and was properly admitted in evidence.
4. The refusal of the court to permit to be read in evidence on the trial the depositions taken before a board of inquiry was proper; the plaintiffs were not parties to that proceeding, knew nothing about it, and had no opportunity to cross-examine the witnesses.
5. As the trip was to be made wholly in the day time, and the boat was not to take on or discharge freight at any intermediate points,

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the evidence of the captain of the boat that she was properly manned for the trip was competent, although the certificate of inspection required a larger number of men than she had.

6. The contention of the company was that the boat sank from its own unseaworthiness, and it was, therefore, proper to permit the captain of the boat, an expert and experienced steamboatman, to testify that the boat, loaded as she was, might strike an obstruction without so far shocking the boat as to call attention of those on board to the fact that an obstruction had been encountered.

7. The evidence of the value of the boat and that it was not insured was competent to show lack of motive in its owners or crew to fraudulently destroy it, as was charged in defendant's pleadings.

8. The court properly refused to permit the two amended answers to be filed; they were not offered till all the evidence was in, and no reason whatever was shown why the defendant might not, with ordinary diligence, have ascertained the alleged facts at any time; besides the allegations did not conform to the proof as given on the trial.

9. Whenever the thing insured is, by the operation of a peril insured against reduced to such a state as to be no longer capable of use under its original denomination, there is an actual total loss; and in case of such a loss, an abandonment is wholly unnecessary. (McArthur on Marine Insurance, p. 138.)

10. The right of abandonment as for a total loss depends on the probabilities at the time the right is exercised. The company's agent was at the scene of the wreck charged with the duty of undertaking the rescue of the property, and he acted upon the assumption that there had been a total loss and that the company was liable for the full amount of the policy. (Orient Ins. Co. v. Adams, 123 U. S., 67.)

11. An abandonment of the property was certainly waived before the suit was brought by the letter of the company, dated May 10, 1892, declining to pay the loss or any of it and declining to have anything further to do with the matter. The rule is that no delay in abandoning, which has not impaired the underwriters' rights, will destroy the right of abandonment. (Young v. Union Ins. Co., 24 Fed. Rep., 279.)

12. The evidence shows that the expense incurred by the plaintiffs in its recovery was as great as the value of the recovered property, and there was, therefore, total loss.

13. The implied warranty of seaworthiness does not apply to this case; the parties themselves having expressly contracted about the matter, all implications ceased. The insurer having undertaken

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to expressly contract against loss in case of unseaworthiness under certain conditions, the proper construction of the contract is that it is liable under all circumstances of unseaworthiness, and that there is no implied warranty of seaworthiness, whatever. (Cropper v. Western Ins. Co., 32 Penn. St., 351; Nichol v. American Ins. Co., 3 Wood & M. (C. C.), 529; 4 Waite's Actions and Defenses, 20.)

14. The gross negligence of those in charge of the boat would not enable the company to avoid liability on the policy—it must show fraud or an intention to destroy the boat. (Louisville Underwriters v. Pence, 93 Ky., 96.)

15. The company having abandoned its efforts to rescue the cargo or any part of it, and denied any liability whatever on the policy, the plaintiffs should not be made to bear any part of the expense, incurred in its preparations to make the rescue, even though those efforts were at first made in good faith.

ELI H. BROWN AND WILFRED CARRICO OF COUNSEL ON SAME SIDE.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

Monarch & Cate owned certain woolen mill machinery, wool and other goods, and desired to transport it from Rumsey, Ky., on the Green river, to Owensboro, on the Ohio river. Their purpose was to ship it by water, and to do so it would have to be placed upon a boat, carried down Green river to its mouth; thence up the Ohio river to Owensboro.

On the 5th day of March, 1892, the Louisville Insurance Co. issued to them on the property a marine insurance policy to the amount of $5,000. The adventures and perils which the company agreed to bear and take upon itself were the "unavoidable dangers of the . . . rivers." . . .

The property was valued at $15,000, and here it may be added that that amount is the conceded value of it. The steamboat George Strecker, under a contract which Monarch & Cate made with her owner, Capt. Crammond, was to carry the property from Rumsey to Owensboro. The policy covered the property during the voyage.

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The property was received on board of the boat. On the morning of the 8th day of March, 1892, the boat started on the voyage, and at a point between ten and eleven miles below Rumsey she sank in the middle of the river, where the water was forty feet deep, entirely submerging her, except the chimneys and the top of the pilot house. After her peril was discovered by the crew she sank so rapidly that it was impossible to get her to the shore. There was a rise in the river soon after she sank, and she remained submerged for several months.

This action was brought by Monarch & Cate to recover of the company the amount of the policy because of the alleged total loss of the property.

The answer denies that there was a total loss of the property; that the sinking of the boat was a peril against which it insured; that there was an abandonment of the property or any part of it. The company alleged the loss was occasioned by the willful, fraudulent and gross misconduct, negligence and carelessness of the owners, officers, agents, servants and seamen in charge of the boat.

There are other matters pleaded in the answer which at this point are not necessary to mention. The trial resulted in a judgment for the plaintiffs for $5,000.

Many errors, the appellant claims, were committed on the trial of the case which entitles it to a reversal and a new trial. We will consider some of the questions thus raised, somewhat in the order in which counsel discuss them in their briefs.

Immediately or soon after the boat sank the company was notified of it. It sent its agent, Captain Harpham, to the wreck to see its condition, with the view of recovering the property under "sue and labor" clause of the policy,

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which fixed the proportion of expense that should be borne respectively by the insured and company.

It is insisted that the court erred in permitting Cate to tell, upon his redirect examination, what Harpham had said to him about the wreck after he had left it. Harpham was sent by the company to act for it in an effort to recover the property. Cate's redirect examination related to what Harpham said as to the meaning of the policy, as to the expense of recovering the property, and the interest each party would have in such as was recovered.

While what Harpham said as to the meaning of the policy was immaterial, as both parties conceded their rights were to be determined by its provisions, yet the court told the jury substantially that, if plaintiffs were entitled to recovery at all, they were entitled to recover the full amount, $5,000; and also that the company was not entitled to be allowed the expense it incurred before it determined to deny its liability for the loss, and abandoned its purpose to recover the property.

In view of the conclusions of the court the evidence of Cate in his redirect examination could not have and did not prejudice the rights of the company.

It is complained that the court erred in permitting Monarch to tell, when recalled, what Captain Harpham had said to Shallcross. Shallcross was the agent of the company; he was in its office looking after its affairs; talked with Monarch about the settlement of the claim; directed the movements of Harpham in his preparation to recover the property; ordered Harpham to discontinue his preparation to recover the property; looked after the payment of the expense Harpham had incurred; he appeared in court aiding in this case; made an affidavit for a continuance, and verified pleadings therein.

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There is no proof in the record showing he was an agent with limited powers. Under these circumstances, it fully appeared that he was authorized to speak for the company in the adjustment of the claim in controversy. If he chose to tell Monarch in a conversation about the adjustment of the claim that he had certain information from another agent of the company, it was not error to permit Monarch to prove the entire conversation which they had. Besides if Shallcross was the agent of the company without limited powers, as he appears to have been, then this testimony was competent as tending to prove that Harpham was authorized by the company to adjust the loss with Cate.

There was an investigation made in the office of hull inspectors at Evansville, Ind., as to the facts attending the disaster; the testimony of certain witnesses was taken and reduced to writing. The defendant offered as evidence the so-called duplicates of this evidence. Monarch and Cate were no parties to that proceeding, and were not even present when it took place.

A mere statement of the facts shows that the court did not err in refusing to admit them as evidence.

Captain Crammond testified that the boat had a sufficient number of officers and men to make the trip. It was proper to admit this because it appears that the boat was to make the trip in daylight, and that, therefore, an additional crew was not needed. This testimony would tend to rebut any presumption that might be indulged that the boat was unseaworthy because the crew was not equal to the number required by the certificate of inspection and license. It could not be said that the company could defeat a recovery when there was a sufficient crew on the boat to properly handle her, although not the number designated in the

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license, especially when there is no evidence even tending to prove that the sinking of the boat resulted from an insufficient crew.

It was likewise proper to allow Crammond to testify that the boat might strike an obstruction, and the contact not be perceivable to those on board. His own experience as steamboatman enabled him to have a knowledge of such matters. This testimony was relevant because the effort was being made by the company to show or to create a presumption that she was unseaworthy because of the defective condition of the hull.

The answer charges that the boat was sunk because of the willful and fraudulent misconduct of the owners and officers, etc., of the boat. Crammond was allowed to testify that the boat was not insured, and that she was worth $5,000.

This evidence was properly admitted to show the owners and officers could have no desire or motive to destroy the boat. If this evidence was not relevant it was not misleading to the jury, and we can not, from any point of view, see how it was prejudicial to the rights of the company. Testimony may be entirely irrelevant, and yet not prejudicial to the rights of the party objecting thereto.

It is insisted that the court erred in permitting the plaintiff, James Cate, to be recalled and to testify for himself in chief after having introduced other testimony for himself in chief.

Subsection 4, section 606, Civil Code, provides that "no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief."

This court in several cases has held that when a party has introduced other testimony for himself in chief he

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should not be permitted to testify for himself in chief. We adhere to that rule. The questions presented in those cases are not involved here. Cate had testified for himself in chief before he introduced other testimony for himself in chief.

After such testimony had been introduced he was recalled as a witness to prove facts which, if competent, could have been testified to by him in chief. After a party has testified for himself in chief the fact that he may have to introduce other testimony in chief does not bar his right to be recalled to testify to such facts as are pertinent to the issues. His right to do so is in the sound discretion of the court. It is within the control of the court, as it is as to the testimony of any other witness who may have testified, except if it was manifest the party had purposely withheld certain testimony while he was testifying for himself in chief with a view of being recalled after he had introduced other testimony in chief, to give additional testimony in chief, the court would not abuse its discretion in refusing to allow him to testify. In this case no facts appear which indicate that there was any abuse of the court's discretion.

It was charged in the answer that the captain and crew of the steamboat were incompetent, unskillful and unfit for the service in which they were engaged. It was sought to show the boat was unseaworthy by reason thereof.

The evidence as to their competency and fitness for the service in which they were engaged when the boat sank and their general reputations as to such competency and fitness was admissible.

It was directly on the issue raised by the answer. It showed they were skillful in the service in which they were engaged, and, besides that, their general reputations were

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such, as steamboatmen, that the owner of the boat was justified in engaging them in their respective capacities for the voyage in question.

The allegations contained in the amended answers, which were offered at the close of the testimony, as stated therein to conform to the proof, may be summarized as follows: That more than one-half of the machinery and goods insured were rescued and afterwards sold to the Owensboro Woolen Mills Co., for a certain amount of the capital stock of that company; that the goods and machinery were not properly or carefully stored or loaded upon it; that the crew on the boat was not the number required by the United States laws, and that they were necessary for the proper and safe running and management of the boat; that the defendant did not learn these facts until during the trial.

In the first place there is no reason why the defendants may not have known all the facts alleged, if true, by the exercise of ordinary diligence. In the second place, they do not conform to the proof.

The testimony of the parties connected with the loading of the boat was that it was properly and carefully loaded; that the carrying capacity of the boat was over one hundred and fifty tons, and the highest estimate as to the weight of the cargo was something over eighty tons. This testimony is not contradicted. Besides it is not alleged in the amendments offered that the disaster resulted from the fact that the boat was not carefullly and properly ladened.

In view of the fact that the proof in the record was insufficient to show that the boat was not carefully or properly ladened, etc., the court did not abuse its discretion in refusing to allow the amended answer to be filed on account of the allegations as to the ladening of the boat.

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The proof showed, and was uncontradicted, that the crew in charge of the boat was sufficient for the voyage, as it was to be made in daylight; besides there was not the slightest evidence tending to show that the boat sank because of the insufficiency of the crew.

The court did not err in overruling the motion to file the amended answers.

It was held in the case of Leaman v. Enterprise Fire and Marine Ins. Co., 21 Federal Reporter, 781, that the omission of a starboard rudder at the port of departure or anywhere along the line can not be said to be a lack of seaworthiness when its absence did not materially affect the steerage power of the vessel or prevent the pilot from maintaining good control over its motions.

Why should a recovery be defeated because the vessel did not have a night crew in a daylight run? Their absence did not affect in any degree the control of the movements of the boat. There was no express warrant that there should be a given number of officers and seamen in charge of the boat. The implied warranty of the insured was that a sufficient number of officers and men should be in charge of the boat during the voyage, and that they should be reasonably skillful for the service.

There is an obligation resting in the law on the insured to see that the vessel is seaworthy. Whether provided in the contract or not, the insured warrants the vessel to be seaworthy when she leaves the port of departure.

The mere negligence of the owners of the vessel or the officers in charge of it is no defense to the policy. (Orient Ins. Co. v. Adams, 123 U. S., 67.)

It was said in Waters v. Merchants Louisville Ins. Co., 11 Peters, 213, "that in marine policies, whether containing

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the risk of barratry or not, a loss when the proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners."

To the same effect is General Mut. Ins. Co. v. Sherwood, 14 Howard, 352; Phoenix Ins. Co. v. Erie Transportation Co., 117 U. S., 312.

The court held (123 U. S., 73), that the only misconduct of the master and officers which would defeat a recovery on the policy was fraud or design.

When the policy insures against the perils of the river, the mere neglect of those in charge of the vessel does not free the insurer of liability, although the policy insures against the unavoidable danger of the river, as such a provision relates to the peril embraced by the policy and not to the skill or care to be exercised by those in charge of the boat. (Pence case, 93 Ky., 96.)

In Levi v. The New Orleans Insurance Association, 2 Wood, 66, it appeared that the custom of the river was that the ascending boats should run under the points near the shore and the descending boats followed the main channel. The failure of the pilot to observe this rule resulted in the collision. The court held it was negligence, carelessness and unskillfullness, but it was not willful misconduct.

There was an entire failure of proof in this case to show such misconduct on the part of the officers in charge of the boat as indicated that she was sunk by their fraudulent or willful misconduct.

Under the instructions of the court before the jury was authorized to find for the plaintiff they had to believe from the evidence that at the time the George Strecker departed on the voyage she was in a reasonably good condition for

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the voyage, and reasonably sufficient to withstand the ordinary perils of the voyage; that she was tight and staunch in hull; that she was provided with a competent master and sufficient number of competent officers and crew, and that they were competent and fit for the voyage. In view of the pleadings and the evidence we are of the opinion that the court's instructions were sufficient in submitting the question of seaworthiness of the boat to the jury.

The plaintiff sought to recover as for a total loss. While the company denies liability, it insists that there was only a partial loss, and if liable then only for the partial loss.

The vessel lay submerged for many months. After the disaster the insurance company determined to try to rescue the cargo. It procured a diver, a boat and necessary appliances for the purpose, and after getting them at the scene of the wreck the river had raised and continued in this condition for two months. About the time it was at such stage of water that the work of recovering the property could be undertaken it abandoned the project and notified the insured that it was not liable on the policy. The plaintiffs soon thereafter notified the company that they abandoned the property and for it to take charge. The cargo was of a character to be destroyed by the action of the water upon it. Its situation was such that there was no reasonable probability that it could be recovered after the company withdrew the men and means provided for the purpose. The situation, in our opinion, was such that justified the insured in abandoning the property then submerged. In determining the question of abandonment of property it is proper to take into consideration where the vessel lay, and all other attendant circumstances. (123 U. S., 75.)

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The emergency of the peril and apparent extent of expenditures required to deliver the property from it will justify an abandonment (12 Peters, 398.)

The right of abandonment does not depend upon the certainty but on the high probability of total loss. The insured is not to act upon certainties but upon probabilities. If the facts present a case of extreme hazard and of probable expense exceeding half the value of the property, the insured may abandon, though it should happen that it was afterwards recovered at less expense. (3 Kent. 321.)

We are of the opinion that the insured would have been justified in an abandonment of all the machinery, household goods and wool not then recovered at the time the company abandoned its purpose to recover the property and at the time it notified the company of its purpose of abandonment.

The difficulty which we see in holding it was a total or a constructive total loss is the fact that at the time of the disaster 1089½ pounds of wool, worth $200, was recovered which the insured received and appropriated to their own use, and also afterwards received some of the machinery, the value of which, owing to its damaged condition, was slightly the advance of old iron, but it was appropriated by the insured.

In view of these facts we are of the opinion that there was only a partial loss. As held in the Pence case, although the action was for a total loss, there could be a recovery for a partial one. The cargo is admitted to have been of the value of $15,000. The policy was for $5,000. Had there been a total loss then the company would have been liable for one-third of the value of the cargo, which is $5,000, the exact amount of the policy. For a partial loss the company is liable in same proportion, for the policy provides: "And in all other cases the said insurance company shall be

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chargeable with its proportion of loss according as the sum herein insured bears to the whole sum at risk."

So the court erred in telling the jury if the company was found to be liable under the policy they should find the full amount of it. The petition alleged a total loss. The answers denied there was a total loss. The reply admitted there was recovered property of the value of $800 at an expense of something over $600. The rejoinder says that the property recovered was of a greater value than stated. There was an issue formed upon this question. But one witness testified as to the value of the property, and that was Cate, one of the insured. He testified that the value of the property in the damaged condition in which it was received was $800, and this includes the 1089½ pounds of wool. He testified that the necessary expense in recovering it was $631.09. An account of this expenditure was presented. The charges for fee bills paid Miles, Walker & Carico, amounting to $33.50, are not allowable for expenses of recovering the property. This would leave $597.59 as the amount of expenses incurred by the insured in recovering the property, and under the policy the acts of insurer or insured in recovering the property are to be "considered as done for the benefit of all concerned."

The effect of recovering any part of the property benefits the insurer inasmuch (in this case) as he is entitled to credit for one-third of its value, less the expense of recovering it.

The value of the property recovered being $800, less $597,-59, the expense of recovering it, which makes the amount of property to be credited on amount at risk $202.41, which makes the total loss $14,797.59, for one-third of which, $4,-932.53, the insurer is liable, instead of $5,000, as determined by the court below, being $67.47 less than the verdict and judgment.

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The question of the liability of the company on the policy was fully tried, and the verdict of the jury and the judgment of the court was to the effect that it was liable. There was a total loss except the value of the property recovered.

There was an issue on this question upon which the company could have introduced evidence. It failed to do so. It had its day in court on the issue. The plaintiff alone introduced evidence as to the property recovered and its value. There is no conflict in the evidence on the issue. The jury could not under the proof have found the facts as to the property recovered or its value other than as we have fixed.

As the company has had the jury to pass upon the question of its liability on the policy, and had its opportunity to contradict the evidence as to the property recovered and its value, we do not think the case should be reversed, with directions to grant a new trial.

The company incurred something over $1,000 in preparing to recover the property—getting diver, boat and necessary appliances, etc. This was done soon after the disaster. The river did not get in a condition for the work for about two months thereafter. Then, without the consent of the insured, the purpose to recover the cargo was abandoned, and the boat and appliances, etc., which were to be used for the purpose were taken away.

The company did not abandon the effort to recover the property because it could not be recovered or because the expense of recovering it would exceed its value, but because it reached the conclusion that it was not liable under the policy.

The insured received no benefit whatever from the expense incurred by the company, nor did the company en-

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counter any obstacle which rendered it impossible to prosecute its effort to recover the property.

The effort is to make the insured pay something over $600 because the company reached the conclusion that it was not liable on the policy. The policy does not authorize the company to incur expense which the insured is liable for in a preparation to recover the property, unless it was developed after such preparation that it could not be recovered or that the expense of recovering it would be so great that it would not be profitable to engage in the effort, or that some unforeseen casualty occurred which prevented it.

When the company abandoned the purpose to recover the property it risked its right to recover any part of the expenses of the insured on its liability to defeat a recovery on the policy.

Wherefore, the judgment is reversed, with directions that the court set aside the judgment for $5,000 and enter one against the defendant for $4,932.53.

CASE 87—AGREED CASE—JUNE 24.

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City of Louisville v. Wilson.
Same v. Nevin.
Same v. Hoertz.
Same v. Martine.
Same v. O'Connell.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. CONSTITUTIONAL LAW—REDUCTION OF SALARY—STATUTORY CONSTRUCTION.—The provision in the charter for cities of the first

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class (sections 2824 and 2861 of the Kentucky Statutes), that members of the boards of public works and public safety in such cities "shall receive a salary of not less than $2,500," does not fix the salaries of such officers; and there being no salary fixed, an ordinance passed after the appointment and qualification of the members of those boards fixing their salaries at $3,000, was not violative of the provisions of section 161 of the Constitution, prohibiting any change in the compensation of municipal officers during their terms of office.

2. MUNICIPAL OFFICERS.—Members of such boards are "municipal officers" within the meaning of section 161 of the Constitution, and their compensation after being once fixed can not be changed during their terms.

3. SAME.—The secretary of the board of public works in a city of the first class, who is required to execute a bond for the faithful discharge of his duties, and who is custodian of the journals of the board's proceedings and other papers and records affecting the public, the assistant bailiff of the police court, who performs the duties of a peace officer and is authorized to serve process and make arrests; and the official stenographer of the police court, whose official acts have the same verity and force as do those of the clerks of the police court, are each and all municipal officers within the meaning of section 161 of the Constitution. To constitute an officer, it is not material whether his term be for a period fixed by law or endures only at the will of the appointing power. If he be invested with some portion of the function of government, to be exercised for the public benefit, he is an officer.

HENRY S. BARKER, D. W. FAIRLEIGH AND JOHN W. BARR, JR., FOR APPELLANTS.

1. The city charter provides definitely that the members of the two boards shall receive a salary of not less than $2,500, and this is not dependent upon any action whatever of the general council, but is payable by force of the statute itself; in the absence of any action to the contrary by the council the salary must be considered as fixed by the charter. The salary having been fixed at the time of the appointment and qualification of the members of the two boards can not be changed during their terms. (Sec. 161 Constitution of Kentucky.)

2. The secretary of the boards of public works is not a municipal officer; his duties are only clerical, no governmental authority is delegated to the position, and no functions of the board can be

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exercised by one holding the place. The office was created by the council, without specifying what length of time the occupant should serve, and it has the right at any time to abolish the place or reduce the salary. The occupant is nothing more than an employe of the municipal government.

3. The stenographer and assistant bailiff of the police court are neither officers for the same reasons given as to the secretary of the board of public works; and in addition to that the charter in section 126 prescribes what shall be the offices of the police court, and neither of them is included therein. (Charter for Cities of First Class, sec. 126.)

4. What distinguishes an "office" from an "employment" or "contract" is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the government, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer. (Abbott's Law Dictionary; Amer. & Eng. Enc. of Law, vol. 19, p. 390; Mechem on Public Offices, secs. 2 and 4; Ryan v. Mayor, 50 Howard, Pr. (N. Y.), 91; *In re.* Corliss, 23 Amer. Rep., 558; Geuntor v. Griffin, 4 Abbott Pr. (N. Y.), 310; People v. Langdon, 40 Mich.; O'Brien v. Mayor, 84 Hun. (N. Y.), 50; People v. Pinckney, 32 N. Y., 377; Goetzman v. Mayor, 6 Hun. (N. Y.), 132; Cramer v. Water Co., 31 Atl., 384; U. S. v. Monat, 124 U. S., 303; Collopy v. Cloherty, 95 Ky., 330; Com. v Adams, 95 Ky., 588; Hoke v. Com., 79 Ky., 574.)

PIRTLE & TRABUE AND HUMPHREY & DAVIE FOR APPELLEES.

1. The legislative provision in the city charter that the salaries of the members of the executive boards should not be less than $2,500, does not fix the salaries at that amount; but the matter is left wholly to the general council with one restriction that it should not fix such salaries at less than the amount named in the charter. And the council having failed, as was its duty, to fix these salaries before the appointment and qualification of the members of these boards, it had a right to do so afterwards. (Purcell v. Parks, 82 Ill., 346; 84 Ill., 551; State v. McDowell, 19 Neb., 442; Wheelock v. McDowell, 20 Neb., 160; Rucker v. Supervisors, 7 W. Va., 641.)

2. The clerks of the executive boards are officers within the meaning of the Constitution. They are the custodians of the records of their respective boards, and the charter and ordinances impose

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upon them duties independent of and apart from the duties of the members of the boards. Where one performs a public function and exercises a public power independent of anybody else, he is a public officer, and not merely an employe.

3. The general council has no power over the appointment of or the fixing of the salaries of the subordinate officers selected by the members of the executive boards, except it may prescribe the limitations as to compensation. (Secs. 2809 and 2810, Ky. Stats.)

4. While the general council had no authority to fix the salaries of these subordinates, still it having attempted to do so by an ordinance, and the boards having ever since acquiesced in the salaries so prescribed by making out pay-rolls and warrants in accordance therewith, the salaries became *fixed*, and can not be changed under the provisions of section 161 of the Constitution.

DODD & DODD, CARROLL & HAGAN AND D. W. BAIRD OF COUNSEL ON SAME SIDE.

Briefs not in the record.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

It is agreed in these five cases, submitted and decided without action, as follows: Appellees Wilson and Nevin were appointed by the mayor for the term of four years, December 14, 1893, confirmed by the board of aldermen of Louisville, and immediately qualified as members respectively of the board of public safety and board of public works.

January 9, 1894, by ordinance of the general council the salary of each member of the two boards was fixed at $3,000 per annum.

By ordinance approved January 26, 1894, it was provided there should be one secretary of the board of public works, his compensation being fixed at $2,000 per annum; and January 31, 1896, appellee Hoertz was, by the board of public works, appointed secretary for the term of four years.

By ordinance approved May 21, 1894, it was provided the

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compensation of deputies of the police court should be $1,500 each, payable monthly; and January, 1895, appellee, J. J. O'Connell, was by I. N. Vetter, bailiff of said court, appointed one of his assistants or deputies.

January 9, 1894, by ordinance, the compensation of official stenographer of the city court was fixed at $1,000 per annum; and February, 24, 1894, appellee, John P. Martine, was, by the judge of the court, appointed to the office.

December 26, 1895, the general council, composed of newly-elected members, passed an ordinance, duly approved by the mayor, changing salaries of members of the boards of public safety and of public works to $2,500 each per annum; that of secretary of board of public works to $1,200 per annum; that of deputy bailiff to $1,200 per annum; and that of official stenographer to $900 per annum.

The main question in this case is whether the ordinance of December, 1895, violates section 161 of the Constitution, as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office; nor shall the term of any such office be extended beyond the period for which he may have been elected or appointed." And the proper determination of it involves the inquiry whether the various ordinances referred to, which first fixed the compensation of these officers, were valid and effectual for that purpose.

If any of them be invalid at all it is only because they were passed after the officers affected by them had qualified and commenced the discharge of their duties, for all appear to have been regularly passed and approved under authority conferred by section 2753, Kentucky Statutes, applicable to Louisville, a city of the first class, as follows: "Except as otherwise herein provided, the general council may, by

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ordinance, prescribe the duties, define the terms of office, fix the compensation, and the bonds and time of election of all officers and agents of the city."

But as none of those ordinances, except the particular one fixing salaries of members of the board of public safety and of the board of public works, were passed subsequent to appointment and qualification of the several officers mentioned, there is no reason for calling in question the validity of any except it may be that one.

The purpose of section 161 was to prevent as well the reduction of compensation of officers, sometimes the result of prejudice and false economy, as increase of it, sometimes brought about by importunity and undue influence on their part, and so there can not be any change at all of an officer's compensation during his term; but there is an essential difference which we are satisfied the framers of the Constitution had in mind, between fixing the amount of compensation an officer shall receive, not hitherto ascertained and settled, and changing it after it has been fixed

It is the obvious and uniform policy of government, State and municipal, as well as just to each officer, to fix his compensation definitely and certainly as to amount, except when he is paid by fees of office. And section 161 does not in terms, nor was intended to forbid or at all, relate to any statute or ordinance that for the first time does fix the salary of an officer; but it is equally necessary for the protection of both the government and officer that his salary, when once fixed, should not be changed during his term, and for no other purpose than to prevent that evil was section 161 made part of the Constitution.

It is, however, contended that section 2824 and section 2861 had the effect to fix and secure to the members respec-

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tively of the board of public safety and board of public works a definite amount of compensation, the two sections being alike, and as follows: "Each member shall receive a salary of not less than twenty-five hundred dollars."

But it is plain the legislature did not intend thereby any more than to prescribe a minimum of the compensation which the general council had been, by section 2753, already empowered to definitely and authoritatively fix; and it is to us equally plain that until the ordinance of January 9, 1894, was passed and approved the members of the two boards did not have the legal right to demand nor the city treasurer legal authority to pay them any compensation whatever.

In our opinion the last-named ordinance is valid, and, consequently, the one of December 26, 1895, must be held invalid.

There can be no question of appellees Wilson and Nevin being officers in the meaning of section 161, and the remaining inquiry is whether the other appellees are

There are various tests by which to determine who are officers in the meaning of the law, but at last, in case of uncertainty, the intention of the law-makers control. To constitute an officer it does not seem to be material whether his term be for a period fixed by law or endure at the will of the creating power; but if an individual be invested with some portion of the functions of the government, to be exercised for the benefit of the public, he is a public officer. (Meacham on Public Offices, section 1.)

The board of public works is by statute vested conjointly with the mayor with executive power, and, as its name indicates, has control and supervision of public places and public improvements, with authority to make contracts in regard thereto.

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By section 2803 it has power to prescribe rules, not inconsistent with any statute or ordinance, regulating its own proceedings and conduct of its officers, clerks and employes, distribution and performance of its business, and preservation of the books, records, papers and property under its control; and, while it does not appear from the agreed statement of facts what particular duties are assigned to the secretary of the board, it is manifest he was intended to be and is more than a mere employe, for he is required to execute bond for the proper discharge of his duties, and, being next in authority to members of the board, is the proper person to keep the required journal of its proceedings, preserve books, papers and records affecting the public. In our opinion he should be held an officer in meaning of section 161.

As to appellee O'Connell performing, as assistant bailiff, the duties of a peace officer, and having authority to serve process and make arrests, there can be no question of his being an officer. Besides, the statute expressly provides for the appointment of assistant bailiff, as it does for the appointment of official stenographer, whose official acts have in degree the same verity and force as do those of the clerk of the police court.

We think appellees are all officers in the meaning of section 161.

Judgment affirmed.

Judge Guffy and DuRelle dissenting.

Judge Guffy delivered the following dissenting opinion:

The principal question involved in these five appeals is the power of the council of Louisville to regulate or change the salary or compensation of the officers named. The majority opinion of the court holds that the appellees are included within the provision of section 161 of the Constitu-

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tion, which is as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed." We can not assent to that conclusion.

Section 160 of the Constitution creates the offices of mayor, or chief executive, police judge and members of the legislative boards or councils, fixes their terms of office and the manner of their selection. It seems to us that section 161, *supra*, only refers to the officers named in the preceding section, and to such other officers as are named in other sections of the Constitution.

Various offices were created by the Constitution, and we think that, upon reason as well as authority, when that instrument speaks of officers, it means only those theretofore named. The fact that section 161 follows section 160, which authorized the legislature to create other offices, does not at all sustain the contention of appellees, for it will be observed that section 161 mentions county officers and no mention is made of county officers in section 160, but in other parts of the Constitution county officers were created, and the manifest object and purpose of section 161 was to protect as well as to provide against the undue influence of such officers.

It is true that section 160 authorizes the legislature to provide for the election or appointment of other officers, and when such officers are elected by the voters of a town or city their term shall be four years. No limit is fixed to the term if the officer be appointed. Hence if section 161 includes officers not named in the Constitution an officer might be appointed for a term of ten years at a fixed salary, which must continue during ten years, although the duties of the officer might become merely nominal.

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The majority opinion in these cases holds that the reason for the insertion of section 161 was twofold, viz: To make the officer secure in his compensation and free him from danger of injustice from an unfriendly power that was authorized to fix salaries and fees, and also to prevent the officers from procuring an increase of compensation by undue influence.

We heartily assent to that view, and we think that it sustains our views as to the true meaning of section 161. We can readily see that the mayor, police judge and legislative authorities of towns should be restrained as provided in the section *supra*. The police judge, being a judicial officer, ought to be free and independent of the other departments, and the same may be truly said of the mayor and legislative authorities. But is it possible that the framers of our organic law intended that the salary or fees of the thousands of subordinate officers of cities, towns and counties should be beyond the power of change during their term? We think not. There can be no reason for such intent, but upon the contrary there are many reasons which demand that such officers should be somewhat dependent upon higher authority. Such dependence would be likely to insure a faithful and efficient discharge of their duties. We know that a subordinate officer may be inefficient and negligent, yet not be liable to impeachment and removal, and it seems from the opinion of the majority of the court in the case of Todd v. Tilford that but few, if any, of the municipal officers can be removed in any other way.

It is the well-settled rule of law that the power that creates an office can abolish the same at any time, and thus leave the incumbent without either employment or compensation. And yet if the majority opinion is correct we have this

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strange condition of affairs, viz.: A large number of officers whose compensation can not be increased or diminished during their terms, but the office can be abolished and the incumbent left without office or compensation. Surely the framers of the Constitution did not intend any such thing.

Our interpretation of section 161 is in harmony with the manifest intent of the provisions, while the attempt to extend its provisions to officers not named in the Constitution involves inconsistencies if not absurdities.

Section 107 of the Constitution provides "that the General Assembly may provide for the election or appointment for a term not exceeding four years of such other county or district, ministerial and executive officers as may, from time to time, be necessary."

Section 235 provides: "The salaries of public officers shall not be changed during the terms for which they were elected."

If the majority opinion is to be the rule of law, then all the subordinate officers appointed or created by virtue of section 107 come within the provision of section 161, and their compensation can not be changed during their terms, whether it be a fixed salary or fees or *per diem*. Such a construction is unreasonable and not in accord with business principles. Subordinate offices may for one year require about all the time of the incumbent, but the next year the duties might not require one-fourth of his time, and yet there could be no reduction of compensation under the majority opinion, and the only relief, if any, to the public would be the entire abolition of the office, although the incumbent might be glad to hold it at a reduced salary.

It is fair to assume that such, to some extent, was the case in regard to the appellees, especially Nevin and Wilson. The

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legislature evidently had an idea that $2,500 per annum was probably fair compensation, hence required that they should have that much. The incumbents accepted the offices and could not have known that they would get more.

A short time afterwards the council reached the conclusion that the compensation should be $3,000 per annum, and the then mayor (Tyler) approved the ordinance. After the incumbents had been in office perhaps a year or more the council fixed the compensation at $2,500, and the ordinance was approved by the same Mayor Tyler. In our opinion each ordinance was and is valid because these officers are not embraced by section 161, but if they are embraced by the section *supra* then their compensation was fixed at $2,500 at the time they were appointed and qualified, and could not be raised to $3,000. The act provided that the compensation should not be less than $2,500, and the most that can be claimed is that the legislature authorized the council to raise their compensation, which it failed to do for a month or two after the qualification of the appellees, Nevin and Wilson.

Suppose the act of the assembly had provided that the salary should be $2,500, but the same might be increased by the council, would anyone contend that the salary had not been fixed? It seems to us that the provision made is substantially the same in fact and in law.

It seems clear to us that the business interests of the towns, cities and counties, as well as the genius of our institutions, demand that the compensation of all officers not mentioned in the Constitution should be at all times subject to the control of the legislative power that creates the offices and fixes the compensation. The taxpayers need protection as well as officers. The law-making power of the towns and cities are by the Constitution required to be elected bien-

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nially, but according to the opinion of the majority of the court they can not effect any reform or change in respect to a large and very important matter of public policy only once in four years.

We can not assent to any such doctrine. We think that the ordinances complained of should be held to be valid.

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*CASE 88—INDICTMENT—NOVEMBER 23, 1887.

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Patterson v. Commonwealth.

APPEAL FROM JEFFERSON CIRCUIT COURT.

1. CRIMINAL LAW—NO POWER TO REVERSE FOR INSUFFICIENT EVIDENCE.—The Court of Appeals has no power to reverse a judgment of conviction in a criminal prosecution upon the ground that the evidence is not sufficient to support the verdict, but only "for any error of law appearing on the record, when, upon consideration of the whole case, the court is satisfied the substantial rights of the defendant have been prejudiced." (Crim. Code, sec. 344.)
2. PRACTICE—WAIVER.—By his failure to either demur to the indictment or move to set it aside, in the court below, because it was not properly indorsed, as required by section 119 of the Criminal Code, and because it was not properly presented in court, as required by section 221 thereof, the defendant has waived his right to make those objections in the Court of Appeals.
3. PRACTICE—COMPLIANCE WITH CODE.—Where the record shows that the indictment was indorsed by the foreman of the grand jury "a true bill," and it sufficiently appears to have been signed by the foreman, the provisions of the two sections of the Code, above referred to, are substantially complied with; and the statement that the foreman of the grand jury "reported" an indictment,

*This case was only recently ordered by the Court to be officially reported.

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means practically the same thing as if it had said he "presented" it, as required by section 221 of the Criminal Code.

4. PRACTICE.—Where the record states that "the defendant is this day brought into court, . . . and came parties by counsel, and the said defendant having heretofore pleaded not guilty of the offense charged in the indictment, for his trial puts himself upon his country, and the attorney for the Commonwealth likewise," it is a fair if not necessary inference, and authorized by the record, that the indictment was read and the defendant's plea stated to the jury, as required by section 219 of the Criminal Code.

5. CONTROLLING STATUTE—RIGHT OF ONE CONVICTED OF CRIME TO TESTIFY.—When a section in the Revised Statutes has been omitted in the General Statutes, or any change made, however slight, in a general law, the whole law as found in the Revised Statutes, on that subject, must be considered and treated as repugnant to the provisions of the General Statutes (Broadus v. Broadus, 10 Bush 299.) And as the witness in this case did not belong to the class excluded by the General Statutes, he was properly permitted to testify. But he was a competent witness independent of that question, as the qualification of an accomplice to testify as a witness in behalf of the Commonwealth is recognized by section 241 of the Criminal Code.

6. EXTRA-JUDICIAL CONFESSION—CORROBORATION.—The courts are not authorized under the law to require other and additional evidence than the proof of confession to corroborate the testimony of an accomplice, or other than the testimony of an accomplice to accompany proof of a confession. It is wholly for the jury to determine whether the additional evidence does or does not conduce to prove the guilt or furnish the corroboration.

7. PRACTICE—VERDICT.—Where the indictment charged the accused with murder, and the jury found "the accused guilty as charged in the indictment, and fixed the punishment at death," although he may have been convicted of manslaughter under the indictment, the verdict sufficiently fixes the degree of the offense, as it is plain what offense the jury intended to find him guilty of and the punishment they intended to inflict.

8. BILLS OF EXCEPTION—BYSTANDER'S BILL.—The truth of what the judge of a lower court states or certifies as the bill of evidence, may be controverted by the affidavits of bystanders in the form of a bill of evidence, but the Court of Appeals has no authority to consider questions of law made during the progress of the trial of either a civil or a criminal case, unless they appear by the bill of exceptions, regularly approved and signed by the judge, to have been passed on by the court. (Garrott v. Ratliff, 7 Ky. Law Rep., 463.)

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9. INSTRUCTIONS—REFUSAL NOT PREJUDICLAL WHEN SAME EMBRACED IN OTHER INSTRUCTIONS.—A refusal by the court to give an instruction which contained a correct statement of the law, is not prejudicial, when the same matter was substantially, and in such manner as to be clearly understood, embodied in other instructions, which were given.

MATT O'DOHERTY, T. L. MARTIN AND N. R. HARPER FOR APPELLANT.

No brief in the record.

P. W. HARDIN AND AARON KOHN FOR APPELLEE.

No brief in the record.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant having been indicted jointly with Albert Turner, though tried separately, for the murder of Jennie Bowman, and by the verdict of the jury found guilty and his punishment fixed at death, prosecutes his appeal.

It has been often decided that this court has no power to reverse a judgment of conviction in a criminal prosecution upon the ground the evidence is not sufficient to support the verdict. But as provided in section 344, Criminal Code, "a judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the court is satisfied the substantial rights of the defendant have been prejudiced." We will, therefore, refer to the evidence no more in detail than is necessary to determine whether it tends to establish the guilt of the accused, and whether he was tried and convicted according to law.

The crime with which he is charged was, as appears from the evidence, committed between the hours of nine and ten

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o'clock of the forenoon, in the dwelling house of A. Y. Johnson, situated in a populous part of the city of Louisville. The statements of the deceased made, after she was injured, and, without objection, admitted in evidence as her dying declarations, and other circumstances, proved on trial, make it clear that the deed was done by two men. But no one but Albert Turner, who had been tried for the offense, and pleading guilty, convicted, testified directly that Patterson, the accused, was one of them, though there was other evidence, some of which will be hereafter referred to, tending to corroborate his testimony.

In behalf of the accused several witnesses testified to his presence in another and distant part of the city at or about the time, as proved by others, the crime was committed. But it was the exclusive province of the jury to decide as to their credibility, as of all witnesses in the case, and also, whether, giving full credence to their capacity to recollect, and disposition to truthfully testify in regard to the precise times and places they saw him, it was still impossible for him to have been at the house of Johnson when the crime was committed.

We will now consider the alleged errors of law:

1. It is contended the record fails to show the accused was legally indicted; and the two sections, it is argued, were violated or disregarded, are as follows:

"§ 119. The concurrence of twelve jurors is required to find an indictment; where so found, it must be indorsed 'a true bill,' and the indorsement signed by the foreman.

"§ 121. The indictment must be presented by the foreman in the presence of the grand jury to the court, and filed with the clerk, and remain in his office as a public record."

The record on the subject is as follows: "This day the

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foreman of the grand jury reported an indictment a true bill against Albert Turner and William Patterson for wilful murder, and previous convictions, which said indictment is as follows, etc."

By his failure to either demur to the indictment or move to set it aside for the causes now relied on for reversal, both of which steps are authorized by the Code to be taken in the lower court, the accused has waived his right to make the objections in this court. But we think the two sections were substantially complied with. For it is expressly stated the indictment was indorsed a true bill, and it also sufficiently appears to have been signed by the foreman. The objection that it was "reported," instead of being, in the exact language of the Code, "presented," is a mere play upon words commonly understood when used in that connection to mean practically the same thing.

2. Following the provisions for impanelling and swearing the jury to try the issue in a criminal prosecution, is section 219, as follows: "The clerk or Commonwealth's attorney shall then read to the jury the indictment and state the defendant's plea."

The record is as follows: "The defendant, William Patterson, is this day brought into court, . . . and came parties by counsel, and the said defendant having heretofore pleaded not guilty of the offense charged in the indictment, for his trial puts himself upon his country, and the attorney for the Commonwealth likewise."

Though it is not in terms recited in the record that either the indictment was read or the defendant's plea stated to the jury, it does appear that an issue was formed, and for the trial of it the defendant puts himself upon the country, the jury in legal parlance being the country and the attorney

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for the Commonwealth likewise." And, as the proceeding thus recorded by the clerk can be properly done only in presence of the jury, it is at least a fair, if not necessary, inference, and such as the record authorizes, that all that was necessary to be done to inform the jury what the charge was, by reading the indictment and what the plea was by stating it, was done. We, therefore, think the record shows the requirement of the section quoted was substantially complied with.

3. In the case of Commonwealth v. McGuire, 7 Kentucky Law Reporter, 814, it was decided by this court that all persons are now qualified to give evidence as witnesses in judicial proceedings, except those expressly excluded by section 8, article 8, chapter 29, Gen. Statutes.

Article 8 referred to contains eight sections, the last one being as follows: "If any person be convicted of either of the offenses described in the five preceding sections, he shall ever afterwards be disqualified from giving evidence in any judicial proceeding, or from being a witness in any case whatever."

By section 5, chapter 107, Revised Statutes, it was provided that, "except as otherwise expressly provided, no person who has been, or shall be convicted of felony, ... shall be competent as a witness in any case unless he has been pardoned; nor shall a person convicted of perjury, or subornation of perjury and the various statutory offenses of pardoned."

But in Broadus v. Broadus, 10 Bush, 299, the rule was laid down and ever since adhered to, that "when a section in the Revised Statutes has been omitted in the General Statutes, or any change made, however slight, in a general law, the whole law, as found in the Revised Statutes on that subject,

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must be considered and treated as repugnant to the provisions of the General Statutes."

As, therefore, section 8, article 8, chapter 29, relates to the subject of disqualifying persons as witnesses who have been convicted of crimes, and is the only section in the General Statutes containing any provision in regard thereto, it must be treated as controlling the question of Albert Turner's qualification as a witness in this case. And, as he does not appear to belong to the class excluded thereby, he was, we think, properly permitted to testify.

It is true, as section 8 reads, persons convicted of perjury and false swearing, denounced in sections 1 and 2, of article 8, are not excluded and may testify, while those convicted of subornation of perjury, be a competent witness although the same class, described in the five succeeding sections, are disqualified. Obviously that omission was not intended and resulted from oversight. But it does not affect the question of Turner's competency one way or the other, for, as said in Broadus v. Broadus, "this court can not . . . . look to the Revised Statutes to supply any defect that may appear in any general law introduced in the General Statutes, except such laws as are expressly left unrepealed." If there was any doubt on the subject it would be removed by section 241, Criminal Code, hereafter quoted, where the qualification of an accomplice to testify as a witness in behalf of the Commonwealth is recognized.

4. It is contended the court erred "in failing to instruct the jury that evidence of extra judicial confession of guilt was not such evidence as the law makes necessary to corroborate the evidence of Turner, an avowed accomplice; and also erred in failing to instruct the jury that Turner's evidence could not furnish the corroboration necessary to the support of evidence of an extra judicial confession."

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The two sections of the Code relating to proof of confession, and to the testimony of an accomplice, are as follows:

"§ 240. A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with proof that such an offense was committed.

"§ 241. A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence, tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows that the offense was committed, and the circumstances thereof."

In Greenleaf on Evidence, it is said that all confessions of this kind, extra-judicial, are receivable in evidence, being proved like other facts, to be weighed by the jury. But in the United States the prisoner's confession, where the *corpus delicti* is not otherwise proven, has been held insufficient for his conviction. See secs. 216-'7, and cases cited.

The same author further says, that there is no rule of law requiring the testimony of an accomplice to be corroborated by other evidence. But that it is now so generally the practice of judges to advise juries not to convict of felony upon the testimony of an accomplice alone, and without corroboration, that its omission would be regarded as an omission of duty on the part of the judges. Sec. 380.

Sec. 240. of the Code is consistent with and was intended to give legislative sanction to the rule applicable to the confession of a defendant, just as it had previously been. And section 241 is in accord with the uniform practice of the courts at the time the Code was adopted.

But there is a material difference between the two sections. For while one relates to the legal effect to be given to a confession when proved as a fact, the other not only pre-

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scribes the legal effect which may be given to the testimony of an accomplice when credited, but also determines the condition upon which the jury may give any credence to it.

The converse of the proposition stated in sec. 240 is, that if the confession is accompanied with proof such offense was committed, that is, with proof of the *corpus delicti*, it will warrant a conviction. But such proof is not, according to the plain language of sec. 241, sufficient corroboration of the testimony of an accomplice to authorize a conviction, other and additional evidence tending to connect the defendant with the commission of the offense being required.

In Craft v. Commonwealth, 80 Ky., 349, it was held to be the duty of the court when an accomplice testifies for the Commonwealth to instruct the jury as to the law contained in section 241; and the court has, in this case, properly given such an instruction.

In the case of Cunningham v. Commonwealth, 9 Bush, 149, it was said: "The manifest meaning of this provision (the same as section 240) is, that, besides the proof of confession a defendant may have made of his guilt, unless made in open court, there must, to warrant a conviction, be other evidence conducing to prove him guilty of the offense alleged to have been committed by him." And the court did, in this case, following the rule there laid down, give the following instruction: "Any confession of the accused, or statement amounting to such, if there be such in the case, will not warrant his conviction, unless same is accompanied with other proof that the offense charged was committed, and tending to connect the accused with the commission thereof."

Although the conclusion, announced in the Cunningham case, is somewhat different from the views just expressed, we would not have hesitated to reverse the judgment if the

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court had failed to instruct the jury substantially in accordance with the ruling in that case, because it was the law, as expounded by this court, when the accused was tried.

But the instruction, which it is contended by counsel should have been given, but refused, is entirely different from and beyond the range of the ruling in that case, and consequently is not sustained by it. The fundamental error in that instruction is that without warrant of the Code, express or implied, it gives to the court what belongs exclusively to the jury, the power to judge of the weight and sufficiency of the evidence in establishing a fact. For while it is made the duty of the court, by sec. 240, as construed in the Cunningham case, to instruct the jury not to convict upon proof of a confession by the defendant, without other evidence conducing to prove his guilt; and by section 241 that a conviction can not be had, upon the testimony of an accomplice, unless corroborated; it is a question of fact and not of law, and, therefore, for the jury and not the court to determine, whether other evidence introduced does or does not conduce to prove the guilt or to corroborate

It seems to us it would be a palpable usurpation of the power given to the jury, for the court to assume authority to direct them what weight is to be given to any particular evidence in determining a question of fact submitted to them, unless in such case as the law in express and unambiguous terms authorizes and requires. And as the law does not authorize the court to require other and additional evidence than the proof of confession to corroborate the testimony of an accomplice, or other than the testimony of an accomplice to accompany proof of a confession, we think the court properly refused to give the instruction referred to. It is not the policy of the law, nor consistent with our

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form of government to enlarge the power of courts, and correspondingly contract that of juries, in determining issues of fact involving life and liberty, and certainly can not be done where it is not expressly provided by statute.

5. One of the witnesses was permitted to state on the trial that he had, on a certain occasion said to another person he could discover with his naked eye a spot of blood on the hat band of the accused. But inasmuch as he testified before the jury to the same fact, we do not see how the accused was prejudiced.

6. The verdict of the jury is in these words: "We of the jury find the accused, William Patterson, guilty as charged in the indictment, and fix the punishment at death."

Counsel contend that verdict does not conform to the Code, does not fix the degree of the offense, and ought, therefore, to have been set aside.

Section 262 of the Code provides that upon an indictment for an offense, consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charge in the indictment.

And by section 257 it is required that in a general verdict of guilty the offense and the degree of the offense and the punishment be fixed.

As the accused is charged in the indictment with murder and nothing else we think the verdict describes that offense with sufficient certainty to meet the requirement of the Code. And although murder and manslaughter are degrees of homicide, and under an indictment for the former a person may be convicted of the latter, yet as murder itself is not divided by our statute into degrees, as is the case in some other States, that part of section 257 requiring the degree

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of the offense to be fixed in the verdict has no application to this case.

The language of the verdict seems to us too plain for doubt as to either the offense the jury intended to find the accused guilty of or the punishment fixed.

7. The bill of exceptions shows that, whenever an objection was made to the conduct of the attorney for the Commonwealth in his closing argument to the jury, the court ruled in favor of the defendant.

But it appears that what is called a by-stander's bill of exceptions was prepared, and is now before us, which purports to show that during the argument of the attorney for the Commonwealth certain statements were improperly made to the prejudice of the rights of accused, which, though objected to by his counsel, the court failed to exclude from the consideration of the jury or to pass on.

Section 337 of the Civil Code, by which proceedings in criminal as well as civil cases are regulated, provides that "a party objecting to the judge's correction of an exception which purports to state the evidence, may within five days after the bill is signed, file the exceptions as written by him, if its truth be attested by the affidavits of two by-standers." But no authority is given to this court to consider questions of law made during the progress of the trial of either a civil or criminal case unless they appear, by the bill of exceptions, regularly approved and signed by the judge, to have been passed on by the court. Nor are we authorized to assume, upon the evidence of a by-stander's statement, that the court failed or refused to pass upon such questions when made.

In Garrott v. Ratliff, 7 Ky. Law Rep., 463, this court said: "The truth of what the judge states or certifies as the bill

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of evidence may be controverted by the affidavits of by-standers in the form of a bill of evidence, but when he certifies as to his own rulings and exceptions taken during the progress of the trial, we know of no practice that authorizes his statement, or the verity of the record as made up, to be assailed either by by-standers, or the affidavits of parties interested in the litigation."

It is proper to say, in justice to the judge before whom this case was tried, that he states every objection made to the argument of the Commonwealth's Attorney, which was heard by him, he passed on. And for obvious reasons of public policy his statement should be taken in preference to that of by-standers.

8. For the accused the following instruction was asked and refused by the court: "The jury can not convict the accused on a mere preponderance of the testimony, but the law presumes his innocence until he is proved guilty to the exclusion of a reasonable doubt."

That instruction contains the law, and the refusal of the court to give it as asked would be sufficient cause for reversal, if the same idea was not fully expressed in some other instruction. But if it was substantially, and in such manner as to be clearly understood, embodied in another instruction, the refusal of it in the form presented did not nor could prejudice the defendant.

Instruction No. 5, given by the court, is as follows: "The law presumes the innocence of the accused, and it is the duty of the jury, if they can reasonably do so, to reconcile all the facts and circumstances of the case with that presumption. And if, upon the whole case, the jury entertain a reasonable doubt of the guilt of the accused, or of any material fact necessary to his guilt having been proven, then they should find him not guilty."

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And in instruction No. 1 the jury were told in substance that, in order to convict the accused, they must believe, from all the evidence to the exclusion of a reasonable doubt, he was guilty of the offense charged.

It seems to us these two instructions so fully convey the idea contained in the instruction refused, that any jury of ordinary intelligence would readily understand that they have no right to convict a defendant of a criminal offense upon a mere preponderance of the testimony. For a belief so decided and clear as to be beyond reasonable doubt can not possibly be produced in the mind of a man, who reasons at all, by mere preponderance of evidence.

We have carefully examined the record in this case, and, perceiving no error of law occurring at the trial to the prejudice of the substantial rights of the accused, the judgment must be affirmed.

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*CASE 89—PETITION ORDINARY—MAY 25, 1895.

Henderson Bridge Company v. Commonwealth.

APPEAL FROM FRANKLIN CIRCUIT COURT.

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1. FRANCHISE TAX.—The fact that a corporation created under the laws of the State of Kentucky for the purpose of constructing a bridge across the Ohio river, has obtained from the State of Indiana and from the Congress of the United States certain powers and privileges with reference to the construction of the bridge, is no reason why it should not pay a franchise tax in this State.

*This case was not sooner reported because pending an appeal in the Supreme Court of the United States. It was affirmed by that Court, and the opinion will be found in 166 U. S. page 150.

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And even if the Kentucky charter had been supplemented by a similar charter from the State of Indiana, authorizing the construction of that portion of the bridge erected in that State, it would be no reason why it should not pay taxes on both its tangible property in this State, and its franchise granted in this State.

2. INTER-STATE COMMERCE.—A bridge company chartered by the State of Kentucky, and authorized to build a bridge across a stream which is the boundary line between this and another State, and to transport merchandise and passengers over its structure, in consideration of reasonable rates of toll, is not engaged in commerce; and the taxing of the franchise of such a corporation by the State of Kentucky is not an attempt to regulate commerce between the States, but merely the exercise of its right to tax the franchise of a corporation created by it.

3. CAPITAL STOCK—WHAT CONSTITUTES.—The "capital stock" of a corporation within the meaning of section 4079 of Kentucky Statutes prescribing the manner in which the value of corporate franchises shall be ascertained, includes the entire property, real and personal, tangible and intangible, and assets on hand, as well as the franchise of the corporation.

4. CORPORATE DEBTS NOT DEDUCTED.—A corporation, in assessing its property for taxation, can not obtain any credit for any debt it may owe. The Constitution requires that the property of all corporations must be taxed in the same manner as the property of individuals, and they are allowed no such credits.

5. BOARD OF VALUATION AND ASSESSMENT—PROCEEDINGS OF.—The proceedings of the board of valuation and assessment are judicial in their nature, and its findings, if not conclusive, are entitled to a high degree of consideration and authority, and should not be lightly set aside or disregarded by the courts, unless the board proceeded upon an erroneous principle, or adopted an improper mode or manner of estimating the value of the franchise, or unless fraud is charged and shown.

HELM & BRUCE FOR APPELLANT.

1. The method of assessment adopted by the Board of Valuation and Assessment is not in accordance with either the letter or spirit of the third article of the chapter on revenue and taxation providing for the taxation of franchises. The legislature evidently intended to arrive at the value of the stock in the limited sense of the word, and in the event that that value exceeded the assessed value of the tangible property, the difference should be set down as the value of the franchise. The legislature intended to tax only that value to the stockholders which is represented by this difference.

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2. The franchise granted by Kentucky is of absolutely no value except as it is used in connection with the franchise granted by Indiana and the federal government. As this State has no power to tax the franchise granted by another sovereignty, and as the franchise granted by this State if considered alone is of no value, the assessment based upon a value of the franchise granted by Kentucky is void. (California v. Pacific R. Co., 127 U. S., 1.)
3. The plaintiff's petition itself alleges, and it is admitted in the pleadings, that the appellant, Henderson Bridge Company, does a purely interstate business, doing absolutely no business wholly within the State. The question then arises, does the statute intend to tax the franchise to be or to do? If it can be construed into a tax of the franchise to be, it is sustainable. If, on the other hand, it is a tax of the franchise to do, as the company does a purely interstate business, it is equally clear that the statute is void.
4. In the case of the Philadelphia Steamship Co. v. Pennsylvania, 122 U. S., 326, the Supreme Court laid down a test for the determination of a question exactly similar to this. The court in that case upon an examination of the statute discovered that it applied to all corporations whether creatures of the State of Pennsylvania or other States, and as the statute treated them all alike, the court conclusively presumed that the attempt to tax the franchise was not the franchise to be, but the franchise to do, and, therefore, held the law to be void. That same test applied to the Statutes of Kentucky shows with equal clearness and by exactly the same process that the attempt here to tax the franchise was the franchise to do and not to be, therefore, upon the authority of the case stated, it is maintained that the statute is void.
5. This proposition does not conflict with the Massachusetts Telegraph Cases, in 125 U. S., 530, and 141 U. S., 40; nor with the Postal Telegraph Case, in 155 U. S., 695. It is, indeed, rather supported by the last-named case, as it clearly is by the case of Gloucester Ferry Company, in 114 U. S., 196. In the Massachusetts cases the court sustained the right to tax the franchise, only because it was a means adopted of arriving at the value of the franchise exercised within Massachusetts, and the court has invariably held that it would sustain a tax, without respect to the name applied to it, if it was the object of the legislature only to arrive at the value of the franchise exercised within the State attempting the tax.

In the case at bar, no part of the franchise being exercised upon business wholly within the State, the law should be declared void.

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WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

Brief misplaced.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This was an action filed in the Franklin Circuit Court by the Commonwealth of Kentucky, against the Henderson Bridge Company seeking to recover of defendant the sum of $3,675.91, the amount of taxes claimed to be due and payable to the State by said company on its franchise, as a corporation, created by the laws of Kentucky, its property being located in the State of Kentucky, for and during the year 1894. Under a valuation and assessment made by the board of valuation and assessment by the auditor, secretary of state and treasurer, as established by law, valuing said franchise as of date September 15, 1893, the value of said franchise being fixed at $865,157.46, excluding therefrom the value of the real estate and personal property owned by said defendant in this State, said company being chartered and incorporated by the State of Kentucky as the Henderson Bridge Company.

The defendant having been so assessed, and the tax rate being 42½ cents on each $100 in value of its franchise, of which assessment defendant was duly notified, and demand being made for amount due, failed to pay.

The answer of defendant is divided into three paragraphs, not in either, however, denying its incorporation under and by the State of Kentucky, nor that its property and franchise is located in Kentucky. Defendant says: First. That though it obtained its charter from the State of Kentucky to build this bridge, yet, that it also obtained important rights, powers, faculties, franchises and privileges from the

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State of Indiana. That under and by its charter from Kentucky it could only build its structure to low water mark on the north side of the Ohio river, that being the northern boundary of the State of Kentucky. Defendant recites in this paragraph sundry provisions from the general incorporation law of the State of Indiana, as of date March 2, 1875, as amended by act of legislature, of date April 8, 1881; showing specially by this amendment that any foreign corporation, duly incorporated under the laws of another State, to build bridges over any of the streams forming the boundary line between the State of Indiana and such other State, might have and enjoy all the rights, privileges and franchises granted under and by their general laws to any home company formed and incorporated under their laws for that purpose.

Then reciting other provisions under the general incorporation laws of the State of Indiana, whereby it says it was finally authorized to construct, build and operate so much of its structure as extended and was situated within the State of Indiana; and in addition, to build so much trestle and embankment and place thereon a railroad as would take trains crossing this bridge out to the Highlands. And it says that without these rights, privileges and franchises, the franchise granted by authority of Kentucky is and was of little or no value.

From the recitals of the law of Indiana as made, one might suppose that this company might have been incorporated under the laws of the State of Indiana had it so desired to extend and complete its structure and approach to this bridge on the Indiana side.

The material defect of this plea, however, is that it does

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not allege that it was so incorporated, under and by any law, general or special, of the State of Indiana.

It only says that being incorporated under and by the laws of Kentucky as the Henderson Bridge Co., it was granted certain powers and privileges under the laws of Indiana, not denying that it actually leased nor that it now owns and operates its bridge and the approaches thereto under and by the charter and incorporation of the legislature of Kentucky.

But it may be further said: Suppose this charter was supplemented by a similar charter, by the State of Indiana, authorizing the construction of that portion of the bridge north of low water mark of the Ohio river. And that the State of Indiana levies and collects its tax both on the tangible property and the franchise. This would be but the exercise of a lawful and rightful authority and power.

What possible excuse could this be to the defendant for refusing to pay taxes on its tangible property in Kentucky, and on its franchises granted in Kentucky?

Is it possible that it may then obtain franchises from both States, and acquire property in both, and exercise its franchise powers in both and deny its duty to pay taxes to either? This part of defendant's plea is insufficient.

Again defendant says it was authorized and empowered to build and operate its bridge by permission and authority of the Congress of the United States, that Congress prescribed the dimensions and height of said bridge and provided that when built same should be deemed a post route. That these were important powers, franchises and privileges without which the incorporation of its company, nor any franchise granted it by the State of Kentucky, was of any value.

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It affirms in its brief the right and power of the Congress of the United States to charter companies and to grant franchises to same, to build bridges over any and all navigable streams in the United States, and cites in support of this contention the case of Saxton v. North River Bridge Co., reported in 153 U. S., page 525. It is not necessary in order to the decision of this case to question the power claimed, nor the authority of the case quoted. The Commonwealth is not undertaking in this suit to impose or collect any tax from defendant on any franchise granted it by authority of the United States, and hence this decision has no application.

The same objection lies to this part of the defendant's answer that is taken to that part of same pertaining to the State of Indiana. And that is, that defendant does not affirm (as, of course, it can not truthfully) that it was in fact incorporated under and by the authority of the United States or any act of Congress, or that it built its bridge under any such act of incorporation or authority. Not denying, as before stated, its incorporation under and by the laws of Kentucky, and not denying the fact that under and by said act of incorporation, it was created a body corporate, and from this charter it derived its powers to build and operate and collect tolls on said bridge.

Neither does counsel for defendant properly distinguish between rights, powers and franchises, granted by the State of Kentucky, under which it built and to-day owns this property, and the duties and burdens imposed by the Congress of the United States but confuses these duties and burdens with grants, privileges and franchises. In this, that while the defendant was created by the laws of Kentucky, and given the rights, powers and franchises that it enjoys in

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the construction of this bridge, all that the Congress of the United States undertook to do was to impose certain burdens and limitations on this power by prescribing certain rules and regulations pertaining to the building of this bridge, so that its construction should in no wise interfere with the free navigation of the Ohio river. This was quite legitimate and altogether proper, and clearly within the power and duty of Congress. And again Congress declared that the bridge when so constructed and built should be deemed a post route. Yet, neither of these things can in any just or appropriate sense be regarded rights, powers, privileges or franchises conferred by the government of the United States, but as burdens imposed only. So this part of the answer of defendant was also defective and wholly insufficient. And the court below should have sustained the demurrer to the first paragraph of same embracing these items noticed.

The second paragraph of defendant's answer is as follows:

"The defendant says that its bridge between the city of Henderson and the State of Indiana is used entirely for transporting inter-State business, transporting passengers and freight between the States of Indiana and Kentucky. The defendant, therefore, insists and alleges that the imposition of a tax by the State of Kentucky upon the franchise of the defendant corporation is a tax upon its right to do inter-State business, and is an unlawful burden upon, and an attempt upon the part of the State of Kentucky to regulate commerce between the States, in violation of that provision of the Constitution of the United States which confers power on Congress to regulate commerce between the States."

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The paragraph again shows gross misapprehension on the part of defendant and its counsel of the questions involved in this case.

This is a question, only, of the right of the State of Kentucky to levy and collect of defendant a tax upon its property owned and situated exclusively in Kentucky, and upon the value of its franchise as a corporation created under and by the authority of the State of Kentucky, and upon a business being wholly done within the borders and limits of the State, and this tax to the same extent precisely as that assessed and levied on all other corporations created by the laws of Kentucky, situated and doing business in its jurisdiction. This tax is assessed only to the extent that the property of all individuals owning property situated in Kentucky may be assessed and collected, and not a farthing more.

We are at a loss to see how this demand by the State of this corporation of the same tax that under the Constitution and laws of the State must be paid by all other corporations, has anything to do with regulating commerce between the States. Or how it in any wise interferes with the constitutional inhibition or any act of Congress ever passed on this subject.

We apprehend that neither under this clause in reference to the regulation of commerce between the States nor under any other clause in the Constitution, has Congress ever undertaken to lessen, impair, abridge or take away the right of any State within the federal Union to levy and collect the same rate of taxes on the property of corporations and individuals, situated and resident within its borders, though they may for the time being be engaged in commerce, that it levies upon the property of all other corpora-

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tions and individuals. Certain it is that Congress has never yet undertaken to pass such a law, neither is it probable that it ever will undertake so to do, at least while its halls are filled with representatives of the people, worthy by reason of their intelligence and character to fill such high positions. And if such a dangerous and destructive law should be passed what lawyer doubts that the courts of the United States would immediately declare it null and void, as at once destroying the sovereign power of the States on this subject of taxation?

This defendant company is not engaged in commerce or transportation at all. It has no authority or power or franchise to engage in commerce or transportation. It was simply authorized to build this bridge and when built then the railroads, that may be engaged in transportation and so indirectly engaged in commerce, may transport merchandise and passengers over its structure, in consideration of a reasonable rate of toll for so doing. This is all, nothing more.

The defendant, the Henderson Bridge Company, is no more, in fact, not as much, engaged in commerce between the States as each and every railroad in the United States, that anywhere on its line may cross from one State into another carrying freight and passengers. And if under this pretense this bridge company can be rightfully and lawfully excused from the payment of its lawful taxes to the State of Kentucky, assessed and levied as we will hereafter demonstrate, at the same rate and estimated in the same mode or manner as that of all other taxes on corporations, then under the same pretext can the property of every railroad in the United States, whose line at any place extends from one State into another, and who is thus necessar-

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ily engaged in transporting freight and passengers from one State into another, be likewise exempted from taxation. We deem this proposition incontrovertible, and simply to state it is to show the utter shallowness and fallacy of the pretext by and under which this defendant corporation seeks to shield and protect itself from its just and lawful share of the public burden.

In this case the property upon which this tax has been assessed, being only that portion of the structure that extends to the low water mark on the north side of the Ohio river, is as much within the territorial limits of the State of Kentucky as if it were situated at the geographical center of the State, and being so situated, is subject to the authority and lawful jurisdiction of the State to the same extent as any other piece of property in the limits of the State, subject only to the Constitutional inhibition that it shall in no wise obstruct the navigation of said stream.

The true line fixed by the original compact between Virginia and the federal government, whereby Virginia ceded her right to all territory north of the Ohio, was to low water mark on the north side of said stream; and this has always been recognized by both the States bordering on this stream as well as by the federal government. It has never been questioned.

This line, low water mark on the north side of the Ohio river, like all other lines, considered with reference to mathematical accuracy, has no element of width or space. It is as clearly and as sharply defined by its own terms as the lines between Indiana and Illinois or Ohio or Michigan.

This court has never questioned the right or the power of Congress to regulate commerce between the States in any and every legitimate way and manner. And yet it con-

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fesses it has but little patience with the many unwarrantable and indefensible demands constantly being presented in this court, torturing and perverting this right into a protection for many derelictions of public duty.

We believe, however, this is the first time that this power has been appealed to to destroy the right of taxation by the State, of property situated within its territorial limits. The demurrer filed by the Commonwealth to this paragraph of the answer was properly sustained by the court below.

The only remaining question is as to the value of the franchise of the defendant corporation and the mode and manner of assessing same, these questions being presented (rather in an argumentative way) by the third paragraph of defendant's answer.

To show that the value of the franchise, as fixed by the board of valuation and assessment, at $865,157.46, is too high, and that the mode of ascertainment adopted was erroneous, the defendant relies chiefly on this clause, in the 4079th section of the Kentucky Statutes: "That said board, from said statement (referring to a sworn statement required to be made by the president of the company), and from such other evidence as said board may have, if such corporation, company or association be organized under the laws of the State, shall fix the value of the capital stock of the corporation, company or association as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State or in the counties where situated. The remainder thus found shall be the value of its corporate franchise, subject to taxation as aforesaid.

The next section, pursuing substantially the same lines of procedure, applies to corporations organized under the laws

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of other States, and having property and doing business in this State as well as in other States, provides for an assessment and an apportionment and as to the merits of this controversy is not material.

And to speak more definitely of defendant's contention, it depends on the meaning to be given to the words, "capital stock of the corporation," found in the section quoted.

This word stock we find used by legislators and by different judicial writers and courts in several different senses, and that its particular meaning must generally be determined by the matter in hand, the thing in the mind of the legislator or the court, the context as well as the clause wherein it may be found.

Mr. Lowell, in his work on Transfer of Stock, section 4, says: "Stock has been succinctly designated as, 'The sum of all the rights and duties of the shareholder.' Again it has been used to denote: First. The capital stock. Second. The shares of stock or of the stockholder. and third, as being applied so as to include both. While the term capital stock generally means the fund or property put in or subscribed by members of the corporate body, yet it may mean the capital put in, and the accumulation of same, not distributed as dividends or profits. Again it is said that the value of the capital stock is measured by that of the corporate property.

An interesting description of this term stock, or capital stock, and what it may mean is found in the case of People v. Coleman, 34 Am. & Eng. Cor. Cases, 223. We make the following extracts:

The capital stock of a company is one thing, that of the stockholder is another and a different thing. That of the company is simply its capital existing in money or property,

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or both, while that of the stockholder is representative not merely of that existing and tangible capital, but also of surplus, of dividend-earning power, of franchise, and the good will of an established and prosperous business.

The capital stock of the company is owned and held by the company in its corporate character. The capital stock of the shareholders, they own and hold in different proportions as individuals. The one belongs to the corporation the other to the corporators. The franchise of the company which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of the capital stock, while the same franchise does enter into and form a part, and a very essential part, of the shareholders' capital stock.

While the nominal or par value of the capital stock, and of the share stock is the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the capital stock. . . . But the surplus does enter into and form a part of the share stock, for that represents and absorbs into its own value, surplus as well as capital, and the franchise in addition. So that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus and its franchise. But these three things, several in the ownership of the company, are united in the stock of the shareholder."

The share of stock covers, embraces and represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities.

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In this case while it is apparent that the court uses the term capital stock of the company or corporation in its most limited sense, it yet makes it clear that the corporation, the company, in its property rights, represents and embraces both capital stock, strictly so speaking, the tangible property owned by the company as well, the surplus, undivided earnings, if any, and the franchise, and while that court describes the shares of stock owned by the several individual members of the corporation as representing in interest and value all these things, yet the same things, all combined, constitute and are the property of the corporation or company.

So again we find it said by a New York court in 1st Sandf., Chancery, 307, "That the corporation is not limited in its ownership of property by the amount fixed as the capital stock."

Again Mr. Cook in his work on Stock and Stockholders, section 9, says: "That while capital stock is to be clearly distinguished from the amount of property owned by the corporation, yet, occasionally it happens that under the terms of stautes relating to taxation, which have been drawn without regard to the technical meaning of the words, the courts have construed the capital stock to mean all the actual property of the corporation, but this is for the purpose of carrying out the meaning of the statute, and is not the real meaning of the term.

Again it is said that the property of a corporation may embrace not only the property contributed by the stockholders, but that otherwise obtained by it under its charter. (See Williams v. Western Union Tel. Co., 93 N. Y., 162.)

Thus we see what a varied meaning this term capital stock may have. So that it becomes necessary to examine

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and see what was the object and meaning of the legislature when using this term in the clause before quoted from section 4079 of our statutes.

In this examination it becomes important to notice those clauses of the Constitution in reference to revenue and taxation, and see what was contemplated and enjoined by that instrument in reference to taxation.

Section 172 provides "That all *property* not exempt from taxation by this Constitution shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale. . . ."

Section 174 provides "That all property, whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this Constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation, based on income, licenses, or franchises.

Then it is manifest that what the Constitution intended to be taxed was property, all property. And as to corporations, not only all tangible property, but that it intended to leave the legislature of the State free to tax the franchises of corporations if it so desired.

That the property of a corporation should be taxed as the property of an individual, it will be observed that in these several sections quoted "capital stock," "stock," and "shares of stock," are not mentioned as being appropriate terms to designate the subjects of taxation, but it says property, all property, so that there might be no confusion as to what that instrument intended.

Neither is there any reason to suspect that the legislature

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did not understand the language and meaning of the Constitution, when they came to frame the revenue laws of the State under it, now under consideration. Neither is there reason to suspect that it did not intend and endeavor in good faith to carry into effect the intent and meaning of the Constitution.

So that we may safely interpret all words and phrases (of doubtful or uncertain meaning), in accordance with and so as to effectuate and carry out that intent.

We find that the legislature, in framing the first revenue law under this new Constitution declared that all property, both real and personal, should be assessed for taxation at its fair cash value; at a fair voluntary sale, etc.

We find that by section 4020, the legislature, for the purposes of taxation of corporations, divided their property into tangible and intangible, leaving the tangible to be assessed by the officers of the county where the same was situated, but that as to the intangible (which term was used as synonymous with franchises), directed that that should be valued and taxed as provided in section 4077.

We find by section 4077 that every railway company or corporation . . . bridge company . . . as also every other corporation company or association, having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons or performing any public service, shall, in addition to the other taxes imposed on it by law annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised.

The auditor, treasurer and secretary of state are created a board of valuation and assessment for fixing the value of said franchise; they are to designate where this tax shall be

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payable, and to apportion same where more than one jurisdiction may be entitled to a share of such tax.

Section 4078 gives some general directions as to how this board of valuation and assessment shall proceed to determine the value of the franchise which is to be taxed.

It provides that the president or chief officer of such corporation shall, between the 15th day of September and the 1st day of October, annually, make a statement under oath, showing the following facts, viz: "The name, place of business, kind of business, etc., engaged in. The amount of capital stock, preferred and common, the number of shares of each, the amount of stock paid up, the par and real value thereof, the highest price at which such stock was sold at a bona fide sale within twelve months before the 15th day of September of the year when the statement is made; the amount of surplus fund and undivided profits and the value of all other assets; the total amount of indebtedness, the principal, the amount of gross or (and) net earnings or income, including interest on investments, and incomes from all other sources within twelve months next preceding the time of making the statement; the amount and kind of tangible property in this State and where situated, assessed or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale and such other facts as the auditor may require.

All this indicating, as clearly as it is possible for language to indicate, that the object of the legislature was that the board of valuation and assessment should then be enabled to form a correct estimate of the value of the entire property of the company or corporation whose case they were investigating.

Then follows the clause in section 4079, before quoted.

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requiring the board from the statement and from all other evidence before it, to proceed to fix the value of the capital stock (meaning the entire property), of the company or corporation, and that from the amount thus fixed, that they shall deduct the assessed value of the tangible property of the company or corporation assessed in the State or in the county where situated and that the balance thus found should be the value of the corporate franchise subject to taxation as aforesaid.

So that the question returns, did the legislature mean by the expression "capital stock," only the amount of money that may have been paid in by the stockholders, or did it mean to embrace and include by that term the entire property of every kind and description, tangible and intangible, embracing not only capital stock originally paid, but all property afterwards acquired and then owned by the company, as well as any surplus, undivided profits then on hand and all other assets, as well as the franchise?

In the light of the foregoing provisions of the Constitution, and of the act of the legislature, and of the instructions given to the board of valuation and assessment and of the sworn statement demanded of the president of the company, on which, with other testimony to make this valuation, we are constrained to say that by this term capital stock the legislature meant to include the entire property, real and personal, tangible and intangible, all assets on hand, and its franchise as well, and that when so embraced and construed and valued as an entirety, then to take off the tangible property already assessed, and that the net balance will show and shall be the value of the franchise to be taxed under section 4077.

This was the construction given to these several clauses

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by the board of valuation and assessment, and we entertain no doubt of its correctness.

All the property of the corporation can not be taxed in any other way. The total value of the property of this corporation was thus fixed at $2,900,000, and the evidence in the record abundantly supports the correctness of this estimate.

While it is true that the technical capital stock of the company was based on $1,000,000, yet, under their charter they were authorized to borrow money and issue bonds in aid of the enterprise, for which they were incorporated, and they did issue $2,000,000 in bonds, and put the proceeds of these bonds, combining same with the $1,000,000 capital stock in the building of their bridge and its approaches, so that they had invested in said enterprise not only the $1,000,000 stock, but proceeds of the $2,000,000 in bonds. And the evidence shows the property in its entirety is worth what it cost.

But defendants argue that they should not be taxed on the debt that it owes. It is not so taxed. Of course a debt can not be made the subject of taxation, as against the one who owes it.

But on the other hand neither can an outstanding debt be deducted from the value of any property in assessing same for taxation. It can not be done in behalf of an individual, is never done. And when the Constitution requires that the property (not stock or capital stock, but property of all corporations) must be taxed in the same manner as the property of an individual, then it is manifest that neither can a corporation in an assessment of its property for taxation, obtain any credit for any debt that it may owe. This proposition we think absolutely clear.

Furthermore, the board of valuation and assessment fol-

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lowing out the line claimed by defendant after determining the value of the entire property of the defendant, fixing same at $2,900,000, deducted from this amount the value of said property, including the railroad and that portion of the bridge proper, situated beyond or north of low water mark, as shown by the evidence, and leaving as the value of the property in Kentucky the sum of $1,514,893, and this was then apportioned by deducting the value of the tangible property listed in Henderson county, namely, $649,735.54, and leaving $865,157.46 as the value of the franchise of defendant to be taxed under this proceeding.

These valuations are clearly within the evidence as shown by the record. It is supported both by the sworn statement of the president of the company (after correcting all mistakes in same.)

It may also be observed in the simple fact that the market value of the stock of the company is in the aggregate $900,000, when we know that the bonds taking precedence of the stock in the sum of $2,000,000 must be good, otherwise the stock could have no value and then that the property and franchise must be worth the $2,900,000.

Again it is shown that the annual gross income for the year preceding this valuation was $217,072.21, enough to pay an annual interest on both bonds and stock of more than seven per cent. Or making another estimate this $217,072 would pay an annual interest on the value of the tangible property as taxed in Indiana and given in to the county of Henderson of nearly seventeen per cent., so that the large earning capacity of the property based on its tangible value only authorizes us to assume that it lies in its franchise. which is the right to charge tolls on every locomotive, freight and passenger car, ton of freight and passenger that passes over its road.

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And this rate of toll is practically up to this time in the discretion of the company, the legislature not having undertaken to limit or control same, and make same reasonable. But it is insisted by counsel in argument that the State of Kentucky has no right to tax the franchise granted by it to this company, and they rely upon the authority of the cases of California against The Pacific Railroad Companies, 127 U. S., 40. We have examined these cases and find that the facts upon which they are made to turn (the very foundation of the decision), are totally dissimilar and unlike the facts in this case, and consequently, that however sound and correct the law announced in those cases may be (and we do not question it), it has no application to this case.

Counsel for appellants copy some two pages of that decision into their brief, showing that the federal courts refused to allow the State of California to tax the franchise of said railroad company.

The court after devoting many pages of that decision to a recital of the facts of the cases before it, as found by the court below, and as the conclusion of fact on which the decision is made to turn, says:

"That if, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises (including that of constructing a railroad from the Pacific Ocean to Ogden City) were conferred upon it by Congress."

Hence the court properly concluded that the franchise of the road, being incorporated and granted by the federal government, was not subject to taxation by the State of California. A state of case wholly different from this case, as before shown in this opinion.

Mr. Morawitz in his work on Corporations section 929, speaking of franchises and their value, says: "Care must

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be taken to distinguish between the different meanings of the word "value." One meaning of the word is price, or the amount for which a thing can be sold. In this sense franchises have clearly no value whatever, because by their nature they are not transferable. They can not be sold or leased or mortgaged, nor can they be taken under execution.

On the other hand, franchises clearly have a value, if the word "value" is used to signify the advantage derived from their possession, or, in other words, their utility. The value of a franchise, using the word "value" in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession.

Thus the value of the franchise in this case aptly illustrates the meaning of the author.

It should be further said that the findings of this board of valuation and assessment partake of a judicial nature. The defendant had its day in court. It did appear on notice before that board and on evidence made its defense. And on this hearing that board rendered its decision in fixing the value of the franchise of defendant, granted by authority of the State of Kentucky, and this finding, if not conclusive, is entitled to a very high degree of consideration and authority, and it should not be lightly set aside or disregarded by the courts, unless the board proceeded upon an erroneous principle or adopted an improper mode or manner of estimating the value of the franchise, or unless fraud is charged and shown to exist.

It is not contemplated by the law that every corporation, company or association operating under and enjoying a franchise from the State, should simply by denying the correctness of the valuation placed on its franchise by this

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board put again the whole thing in issue and have same reheard and readjudicated by the courts. It would be an insufficient system of revenue for the State if the just taxes against every such corporation, company or association could only be collected at the end of a separate law suit against each.

We have thus gone into the merits of this case at some length, knowing the importance of a correct interpretation of our existing revenue laws, with reference to the taxation of the franchises of all corporations, companies and associations operating under and enjoying the benefits of same, conferred by this State.

The court below disregarded the finding of the board of valuation and assessment as to the value fixed on the franchise of this defendant company, supported, as it was, by the only other evidence introduced on the trial of the cause, and fixed the valuation of said franchise for the purpose of taxation at the sum of $140,000 only, and rendering judgment for the Commonwealth on that basis (at 42½ cents on the $100 value of same, as fixed by law), for the sum of $595. From that judgment both parties appealed.

That judgment was erroneous, and on the appeal of the Commonwealth, is reversed, but affirmed on the appeal of the Henderson Bridge Company. It is now ordered that same be set aside and held for naught, and this cause is remanded for further proceedings consistent with this opinion.

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SEPTEMBER TERM, 1896.

CASE 90—AGREED CASE—SEPTEMBER 22.

S. H. Stone, Auditor, v. J. R. Pflanz, Sheriff, et al.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. JAILER'S FEES—STATEMENT TO AUDITOR—OFFICIAL SERVICES.—The services required of jailers by sections 356 and 1730 of the Kentucky Statutes are official services; and the fees allowed the jailer under those sections for attendance upon circuit, county and quarterly courts and furnishing fuel, lights and water for same, must be included in the statement required of the jailer of counties of 75,000 population or over, by the provisions of section 1773 of the Kentucky Statutes, to be made monthly to the Auditor of Public Accounts and showing the amount received by him as fees or compensation; and the Commonwealth is entitled under the provisions of section 1774 to retain 25 per cent. of the fees and compensation so paid into the treasury by the jailer.
2. JAILER'S DUTIES—SUPPLIES FOR COUNTY OFFICERS.—The jailer is not authorized under the provisions of sections 356 and 1730 of the Kentucky Statutes, or any other statute, to furnish fuel, lights, water, etc., to county or other officers.

W. S. TAYLOR FOR APPELLANT.

1. The statute requiring the various officers in the counties of the State, containing 75,000 inhabitants, to report and pay into the State Treasury all fees collected by them, and directing that the auditor shall draw his warrant in favor of said officer for a sum not exceeding 75 per cent. of the amount so reported, is a general law, and applies to all officers and counties which come within the class named therein.
2. The statute does not discriminate against Jefferson county—it applies alike to all counties of that class. And even if it did discriminate, one not affected thereby will not be heard to make complaint for the county.

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3. The requirement that their officers shall pay into the State Treasury a certain per cent. of their fees, does not put any additional burden upon the counties having 75,000 or more inhabitants, so long as the fees of the officers are no greater than in other counties.
4. There is no statute authorizing the jailer to furnish lights, fuel, janitor, etc., to county officers.
5. By the act of April, 1893, the General Assembly undertook to legislate upon the entire subject touching the duties of jailers, and it must be considered the whole law on the subject, and that all laws in conflict therewith, are by implication repealed.
6. The fees for attendance upon the courts are a part of the compensation of the jailer's office and should be included in the report required of him by the statute to the auditor.

CARROLL & HAGAN FOR APPELLEES

1. The allowance to the jailer for attendance upon and furnishing lights, fuel, etc., to the courts, is not a fee or compensation to the jailer, and such sums should not be included in his report to the auditor. No fixed sum is allowed for these services in the quarterly and county courts, but "not exceeding $2 a day," the purpose of the law clearly being to appropriate only so much for the purpose as was necessary to furnish those conveniences—the jailer in no sense being a beneficiary.
2. To require these allowances which are paid out of the county levy of Jefferson county, to be paid into the State Treasury, where 25 per cent. of it must remain under the statute, and be used for State purposes, is to require Jefferson county to pay into the State Treasury money collected under a tax levy for local purposes, and a statute attempting to give the State such a power is unconstitutional. (Hammett v. Philadelphia, 69 Pa. St., 146; Dargan v. Boston, 12 Allen, 223; Sharpless v. Philadelphia, 21 Pa. St., 147; Bergen v. Clarkson, 6 N. J., 352; Livingston Co. v. Wieder, 64 Ill., 427; State v. Hoben, 22 Wis., 660; State v. Supervisors of Dutchess, 1 Hill, 50; Cooley on Taxation, chap. 5, p. 104; Slack v. M. & L. R., 13 B. M., 1; Lexington v. McQuillan, 9 Dana, 515; Cheaney v. Hooser, 9 B. M., 330; Preston v. Roberts, 12 Bush, 570; Marshall v. Dunavan, 10 Bush, 681; Talbott v. Dent, 9 B. M., 526; Town of Parkland v. Gaines, 88 Ky., 562.)
3. The county officers and officers of the courts are a necessary part of the machinery of the courts in the administration of justice. They are provided with offices in the court house, and are clearly

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included within the provision of the statute requiring fuel, lights, etc., to be furnished to the courts.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This appeal is by S. H. Stone, auditor of public accounts, from a judgment of the Jefferson Circuit Court, rendered in an agreed case, the controversy being in regard to certain rights and duties of the jailer of that county.

Section 1772, Kentucky Statutes, relating to counties having a population of 75,000 or over, Jefferson being such, is as follows: "The jailer shall . . . receive an annual salary of five thousand dollars; and the number of his deputies, guards and turnkeys, and the salaries allowed to each, shall be fixed by the judge of the county court, the mayor of the city where the jail is located, and the judge of the criminal division of the circuit court; but the annual salary of the chief deputy shall not exceed eighteen hundred dollars, nor shall the annual salary of each of the other deputies, guards or turnkeys exceed twelve hundred dollars," etc.

Section 1773 provides: "The jailer shall, on the first day of each month, make out an itemized statement, subscribed and sworn to by him, showing the expenses of his office, exclusive of salaries, and the amount of such expenses, as well as the amount received the preceding month by such jailer as fees or compensation, or due to him for all services rendered by him in his official capacity, and whether due or paid to him by the State or city or county or United States government, and shall at the same time pay to the auditor the amount so received," etc.

Section 1774 provides: "Upon the receipt of such statement the auditor shall draw his warrant upon the treasurer for an amount not exceeding seventy-five per cent. of

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the amount of the fees or compensation due to or paid to the jailer for services rendered the preceding month. If the amount so paid is not sufficient to pay the salaries and expenses of the office for the month, the deficit may be made up out of the amount paid in any succeeding month; but in no event shall the amount paid exceed seventy-five per cent. of the amount paid into the treasury by the jailer or credited to him by the auditor," etc.

In addition to proper and fixed fees for imprisoning, keeping, dieting and releasing prisoners, each jailer is, by section 1730, allowed for attending county and quarterly courts, to be paid out of the county levy, per day not exceeding $2; for furnishing fuel and lights to county and quarterly courts a reasonable compensation, not exceeding $2 per day, to be paid out of the county levy.

He is also, by section 356, allowed for each day's attendance upon the circuit court $2; and for furnishing fuel, lights and water to the circuit court not exceeding $2 per day. And the principal question in this case, submitted to and determined by the court below, is whether the amount received by the jailer of Jefferson county under sections 1730 and 356 should be included in each monthly report he is required by section 1773 to make; and whether the Commonwealth of Kentucky is entitled, in virtue of section 1774, to retain twenty-five per cent. thereof.

Section 1773, in plain and unqualified terms, requires the jailer of a county having a population of 75,000 or over to make out, on the first day of each month, an itemized statement, showing the amount received by him the preceding month as fees or compensation, or due to him for all services rendered by him in his official capacity, whether due or paid by the State, city, county or United States government, and

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at the same time pay into the treasury the amount so received; and in pursuance of the manifest policy of law the auditor, or by his direction the jailer for him, is required by section 1775 to speedily collect the amount found to be due by each monthly statement from the county, city or United States government, as the case may be, and give to the jailer credit by the amount so collected and paid into the treasury, as well as by the amount due from the State, which latter amount shall be considered as paid to the auditor by the jailer.

As the services required by sections 356 and 1730 are, in meaning of section 1773, unquestionably official services, and compensation therefore is fixed and provided for by statute, it would, in our opinion, be very difficult to make plainer the intention of the legislature that the jailer shall account for, report and pay the amount thereof into the treasury than is done by the language of section 1773.

Any other construction of that section would be contrary to section 106 of the Constitution, which requires jailers and other officers, in counties having a population of 75,000 or more, to be paid out of the State treasury by salary to be fixed by law, but not to exceed 75 *per centum* of the fees collected by them respectively and paid into the treasury. Besides, to permit the jailer in such case as this to appropriate wholly the fees and compensation received for services rendered under sections 356 and 1730 would enable him to evade section 246 of the Constitution, which provides that no public officer, except the governor, shall receive more than $5,000 per annum as compensation for official services, independent of the compensation of legally authorized deputies and assistants.

We do not see how the statute, as we construe it, does

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injustice to such county, inasmuch as it is not required to bear any greater or other burden than counties having less population than 75,000.

If such be the proper construction of section 1773. it seems to us to necessarily follow that the Commonwealth is entitled, under section 1774, to retain twenty-five per cent. of the fees and compensation so paid into the treasury by the jailer.

Another question submitted and determined is whether the jailer is authorized, by sections 356 and 1730 to furnish fuel, light, water, etc., to the various officers of Jefferson county, who are now appellees. In our opinion neither of those sections, nor any other statute, authorizes in terms or by reasonable implication the jailer to render such service to any county or other officer.

The judgment of the lower court is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

CASE 91—PETITION EQUITY—SEPTEMBER 23.

Dumesnil et al v. Gleason.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. MUNICIPAL CORPORATIONS—PUBLIC WAYS—APPORTIONMENT OF COST.—Where an alley is constructed through one-quarter of a square and into, but not through another quarter, the whole cost of the construction of the alley should not be equally apportioned to and assessed upon the ground embraced in the two quarters of the square, without reference to the length or extension of the alley in each of them; but the ground in each quarter is liable to

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assessment only for its ratable proportion of the cost of the construction of that part of the alley binding upon the quarter of the square in which it is situated.

GRUBBS & MORANCY FOR APPELLANTS.

1. Under the charter of the city of Louisville in making assessments for costs of public ways, the *quarter* square is the taxing district; and that being true, each quarter square should be assessed to pay for the improvements binding on it, and no more. (Cooper v. Nevin, 90 Ky., 85; Boone v. Nevin, 14 Ky. Law Rep., 547; Smelz v. Giles, 12 Bush, 494; Meyer v. Zell, 14 Ky. Law Rep., 816; Zable v. Connelley, 6 Ky. Law Rep., 309; Shadburne v. Connelley, 6 Ky. Law Rep., 600; Dumesnil v. Shanks, 17 Ky. Law Rep., 170.)

LANE & BURNETT FOR APPELLEE.

1. The alley improved in this case is between and parallel with, but not equi-distant from Ormsby Avenue and Park Place; and the assessment of the cost of the improvement should extend throughout the length of the improvement, at least to the parallel streets on each side of it, and throughout its length as improved. (Smelz v. Giles, 12 Bush, 491; Washle v. Nehan MSS. Opinion, 13 Oct., 1881; Watson v. Nevin, 86 Ky., 498; Boone v. Nevin, 15 Ky. Law Rep., 547; Loesser v. Redd, 14 Bush, 20.)
2. In the apportionment of the cost of improving an alley in the interior of a square, each square foot of land within the square should be charged with the same amount, and the only exception to this rule that has ever been recognized, is when the alley lies wholly within one of the quarters of the square. (Connelley v. Shadburne, 6 Ky. Law. Rep., 600.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

This case belongs to the same class of cases to which the cases of Beck v. Obst, &c., 12 Bush, 268; Smeltz &c., v. Giles, &c., *Ib.*, 491; Washle, &c. v. Nehan, 3 Ky. Law Rep.,

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387; and Dumesnil, &c. v. Shanks, &c., 17 Ky. Law Rep., 170, belong.

Each of these cases involved the question as to the apportionment of the cost of improvements in the interior of certain squares in the city of Louisville, and originated under substantially the same statutory provisions regulating such assessments and apportionments, which also apply to this case.

The Shanks case and this case each relates to the original construction of an alley in the interior of the same territory, which is designated a "square," and which is bounded on the north by Ormsby avenue, on the east by Fourth street, on the south by Park avenue and on the west by Sixth street. This territory extends from north to south, between the two avenues, something more than 450 feet, and from east to west, between the two streets, 900 feet, and is about twice the size or dimensions of the squares to the north, lying on both sides of Fifth street, which street runs from the Ohio river to Ormsby avenue.

The rule for the apportionment of the cost of the original construction of "public ways" under the provisions of the charter of the city, and which has been so often recognized by this court, is that the cost of such improvements must be apportioned and assessed upon each quarter-square contiguous thereto, the object and result of the rule being to charge the cost in each case upon the property most benefited by the improvement. (Smeltz, &c., v. Giles, &c., *supra*.)

Under the force and operation of this rule, the quarter-square being the taxing district, no lot therein should be exempted from its due proportion of the cost of such an improvement if the quarter of which it forms a part binds

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on the improvement. (Boone v. Nevin, 15 Ky. Law Rep., 547.)

In the Shanks case the alley ran north and south, and was situated entirely within the two quarters embraced in the east half of the square, or in that part of it east of a line which would be the center of Fifth street if extended through the said territory, and the cost of the construction of the alley was assessed by the court below equally upon all of the ground contained in the four-quarter squares; but this court, following the principle laid down in Washle v. Nehan, *supra*, held that the ground in the northwest and southwest quarters ought not to have been charged with any part of the cost. And the reason for so holding was stated in the opinion of the court to be "the palpable injustice and inequality resulting from this assessment," which were said to be "so glaring as to emphasize the importance of giving some elasticity to the general rules which we recognize as governing these matters."

In this case the alley was constructed mostly in the east half of the square, connecting with the alley which was the subject of the litigation in the Shanks case, and running thence, we may say, to the west half of the square, and for a short distance into the southwest quarter, but, as alleged in the answer and shown by the map or diagram accompanying the record, not touching any part of the northwest quarter of the square. The total cost of the construction of the alley amounted to the sum of $1.214.45.

The appellants, H. A. and Mary Dumesnil, own 96,554 square feet of the ground in the southwest quarter, and 96,662 square feet of ground in the northwest quarter of the rectangular "square," and the appellant, Henrietta

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Ormsby, owns 7,569 square feet on the east end of the northwest quarter. As in the Shanks case the cost of construction was apportioned and assessed upon all of the ground by square feet in each of the four-quarter squares. The appellants having refused to pay the several amounts apportioned to them, this action was brought by the contractor to enforce his statutory lien upon their property, and to subject it to pay the assessments.

It was alleged in the answer that the ground or lot owned by appellant, Henrietta Ormsby, fronting thirty-three and four hundred and eight thousandths (33.408) feet on the south side of Ormsby avenue, excepting a strip off the southern end thereof, and three and four hundred and twenty-five thousandths (3.425) feet wide, lies wholly within the northwest quarter, and that the said strip lies within the southwest quarter of the said "square."

It was further alleged that "no part of the ground in the northwestern quarter of said territory binds on the improvement mentioned in plaintiff's petition, but the whole of said eastern half of said territory, excepting thirty-three and four hundred and eight thousandths (33.408) feet off the western end thereof, which thirty-three and four hundred and eight thousandths (33.408) feet of said alley lies wholly within the southwestern quarter of said territory."

The amount charged against or assessed upon the ground owned by the appellants, H. A. and Mary Dumesnil, in the southwest quarter is the sum of $290.58; the amount assessed upon their ground in the northwest quarter is the sum of $290.91; and the amount assessed upon the lot of the appellant, Henrietta Ormsby, is the sum of $22.77.

The defense made was that their lots of ground had been charged with greatly more than their proper proportion

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of the aggregate cost of constructing the alley; and it was claimed in the answer in substance that the ground belonging to the appellants, H. A. and Mary Dumesnil, in the northwest quarter of said territory, ought to have been charged with no part of the cost of said improvement; that no more than thirty-three and four hundred and eight thousandths (33.408) feet of the alley extended into the southwest quarter, and that their ground in said quarter ought to have been charged with no more than a proportionate part of the cost of constructing that part of the alley; and that the lot belonging to the appellant, Henrietta Ormsby, ought not to have been assessed for the cost of any part of the alley that lay within the eastern half of the said territory.

A demurrer was filed to the answer and was sustained by the court, and, the appellants failing to plead further, judgment was rendered enforcing the contractor's lien on the several lots of ground belonging to the appellants for the respective amounts above specified. Exceptions having been duly taken, that judgment is before us for revision.

The contention here is upon the claims set up in the answer, which have been stated, and, the averments of the answer relative to the situation or location of the ground of the appellants respectively with reference to the alley having been admitted by the demurrer, must be taken as true, viz: That no part of the ground in the northwest quarter of said "square" binds on the alley, but that the whole of the said alley lies within the eastern half of the "square," excepting thirty-three and four hundred and eight thousandths (33.408) feet taken off of the west end of the

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alley, which number of feet of the alley lies wholly within the southwest quarter of said "square."

The learned chancellor, in his opinion, while feeling bound by what he regarded as the current of decisions in this State on the question to hold that "the whole square is the taxing district" except where "the entire improvement is in one-fourth of the square," strongly intimated that he held a different view of what the rule should be. The judgment, accordingly, seems to have been based on the idea that under decisions heretofore rendered in such cases the whole square is the taxing district. We do not understand that to be the statutory rule, nor the rule established by the decisions of this court in such cases as this. The statutory rule is that each subdivision of territory in the city, bounded on all sides by principal streets, shall be deemed a square, and that the original construction of public ways shall be made at the cost of the owners of lots in each fourth of a square binding upon or contiguous to the improvement, to be equally apportioned according to the number of square feet owned by them respectively, with an exception with reference to corner lots. This court has never undertaken to change this rule, nor can it be done except by legislative power, but in applying it the object has been in all cases as far as possible to secure equality of burden, recognizing the principle that "all municipal assessments are based on the ground that the property assessed is benefited by the improvement for which the assessment is made." (Preston v. Roberts, &c., 12 Bush, 587.)

With reference to improvements in the interior of a square this principle was recognized in the case of Smeltz, &c. v. Giles, &c., *supra*, in which the improvement, consisting of an alley, extended through the square, and the

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division thus made of the square was unequal, yet the lots assessed were contiguous to the alley, and as such were held subject to assessment for the cost of its construction.

The case of Washle, &c. v. Nehan, was another case of an alley constructed in the interior of a square, and wholly within one of the quarters of the square, and the court held that the owners of lots in another quarter of the square were not liable to assessment for constructing or improving the alley because the quarter in which their lots were did not touch the alley.

In quoting the provisions of the charter of the city prescribing the rule for apportioning the cost of such improvements, which were substantially as we have stated them, the court used the following language: "The object of the legislature in thus localizing taxation for such purposes is to require each improvement to be made at the cost of those presumed to be specially and directly benefitted by it, and to prevent arbitrary and unequal assessments without equivalent advantages. And according to the only reasonable construction of the acts, and the one heretofore uniformly given by this court, the relative location of the fourths of squares and not of the lots determines what property is liable to assessment for each improvement."

In the Shanks case the cases of Washle v. Nehan and Smeltz v. Giles were referred to and quoted from and commented on with approval. But in neither of the cases referred to was the precise question raised that is raised in this case—that is, as to the apportionment of the cost of an alley, as in this case, constructed from or through one quarter into another quarter of a square, and whether the whole cost of construction should in every case be equally apportioned to and assessed upon the ground

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embraced in each of such quarters of the square without reference to the length or extension of the alley in each of them. The established rule is that the assessments should be made upon the facts existing at the time the improvements are made, and not with reference to what the facts may be in the future. (Preston v. Roberts and Beck v. Obst, *supra.*)

And applying the principles stated and recognized in the cases we have referred to we hold that the ground of the appellants in this case is liable to assessment for their ratable proportion of the cost of the construction of no more than that part of the alley upon which the fourth of the square embracing their ground binds, and that the apportionment and assessment as made in this case against the ground of the appellants and enforced in the judgment of the court below was erroneous. This will secure, as nearly as may be, equality of burden in accordance with the spirit of the statutory rule of apportionment of cost of each improvement.

The judgment is, therefore, reversed and the cause remanded, with directions to overrule the demurrer to the answer, and for further proceedings consistent with this opinion.

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CASE 92—AGREED CASE—SEPTEMBER 24.

Anderson v. Richards' Executors.

APPEAL FROM UNION CIRCUIT COURT.

1. DEVISE OF LEASED LANDS—TO WHOM RENTS SHOULD GO.—Where one leases land for a term and dies before the expiration of the term leaving a will disposing of the leased property, the rents accrued thereon prior to his death should go to his estate, and those accruing afterwards to the devisee; and the fact that no part of the rent was due under the terms of the lease at the time of his death does not change the rule.

ADAIR & MORTON FOR APPELLANT.

1. Rents accruing after the death of the testator vest in the devisee. In this case no part of the rent was due till after his death, and must be deemed to have accrued thereafter. (Ranck v. Hill's Adm'r, 8 Bush, 67; Ball v. First Nat. Bank, 80 Ky., 401; Cass v. Smith, Blair & Co., 7 Ky. Law Rep., 305.)

ALLEN & HUGHES FOR APPELLEES.

No brief in the record.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

W. G. Richards died the 11th day of November, 1892, having first made a will, which will was probated in December, 1892. By his will he devised 107 1-2 acres of land to the appellant, Maggie Anderson. The land was under rent for the year 1892, ending December 31, 1892.

The devise is to "Maggie Anderson, to have and to hold to her, her heirs and assigns forever. But should she die

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without issue of her body then living this legacy is to lapse, and said land is to vest in the sons of my deceased brother."

The appellant claims the rent due for the full year 1892, while the executor contends that the devisee is entitled only to rent from the death of the testator. An agreed statement was made and submitted for judgment in the court below, which court adjudged that the devisee was only entitled to rent from the death of the testator, and that the executor was entitled to the residue. To reverse that judgment this appeal is prosecuted.

The contention of appellant seems to be that, inasmuch as the rent was not due or the term ended at the date of the death of the testator that the whole of such rent must be deemed to have accrued after the death of the testator. We find that Mr. Webster defines accrue: "First, to increase; to augment. Secondly, to come to by way of increase; to arise or spring as a growth or result; to be added as increase, profit or damage, especially as the produce of money lent; interest accrued to principal."

It has been often decided by this court that the rent which accrued after the death of the owner of the real estate belonged of right to the heir or devisee, but we are not aware of any decision which sustains the contention of appellant. More than ten months of the rent of the land in question had accrued (whether due or not) before the death of the testator, and that rent so accrued was properly adjudged to the appellee and the residue to appellant.

Judgment affirmed.

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CASE 93—INDICTMENT—SEPTEMBER 25

Louisville & Nashville R. R. Co.

v. Commonwealth.

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APPEAL FROM TAYLOR CIRCUIT COURT.

1. RAILROADS—SEPARATE COACHES.—Where a train is chartered from a railroad company to be run as a special train by those who chartered it, and the company furnished them the cars for both white and colored persons, as required by section 795 of the Kentucky Statutes, the company was guilty of no offense because the manager of the train required colored persons to occupy a car thereon which did not have the same conveniences and accommodations as the other cars of the train occupied by white persons.

If any offense was committed, it was the failure of the conductor or manager of the train to assign the parties to the proper coaches as required by section 799.

W. C. McCHORD FOR APPELLANT.

1. It is admitted that the appellant furnished the separate coaches with equal accommodations and conveniences, as required by the statute; and that being true, if the conductor or manager of the train failed to assign persons to their proper cars, as is required of them by the statute, they and not the company have been guilty of an offense.

JOHN McCHORD AND H. W. BRUCE OF COUNSEL ON SAME SIDE.

W. S. TAYLOR FOR APPELLEE.

1. The train was being operated by appellant's employes, although it was a special train; and the mere fact that it was chartered as a

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special train does not relieve appellant from complying with the law.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

By section 795, Kentucky Statutes, any company, person or corporation operating railroad cars or coaches by steam or otherwise on any railroad line or track within the State are required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, is deemed a separate coach within the meaning of the statute, but each separate coach or compartment must bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

Section 796 declares that the person or company operating the road shall make no difference or discrimination in the quality or convenience or accommodations in the cars or coaches or partitions set apart for the white and colored passengers.

Section 797 provides that any company that shall fail or refuse to comply with the provisions of sections 795 and 796 shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than $500 nor more than $1,000 for each offense.

The indictment charges that the railroad company did "unlawfully and wilfully, by its agents, employes or those in charge of its train of cars, fail or refuse to furnish a separate coach for white and colored passengers of the same quality, convenience and accommodations in its cars or coaches or partition set apart for white and colored passengers."

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On the trial the company was found guilty and fined $500. The train in question was a special, not running on the time of any regular train on the road. It was chartered by South & Hargis to run from Greensburg to Campbellsville. They sold the tickets and collected the fares and directed where the train was to stop, but the train was operated with the company's crew, including the conductor.

At a station some five miles from Campbellsville the train was stopped to receive passengers. Among those who boarded the train were two negroes, Thomas White and his wife, Lula. Smith collected their fare to Campbellsville. White and his wife got in the car which was used by the company for colored passengers on the road, and upon which he had been in the habit of riding. Smith ordered White and his wife to take a car which was attached to the train which appears to have been a mail and tool car, and which does not appear to have had the same conveniences and accommodations of the other cars. At the time in question the compartment in the coach set apart for colored passengers was partly used by white passengers.

It is not contended that the compartment in the coach used for colored passengers was not of the same quality and did not have the same conveniences and accommodations as those used for carrying white passengers. The offense, if one was committed, consisted in those in charge of the train removing the colored passengers from the compartment in the coach provided by the company for them to the so-called "tool car."

White proves that he was in the compartment for colored passengers when ordered into the tool car. Under the statute a penalty is denounced against persons, companies and corporations operating lines of railroads for the failure

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to furnish separate cars or coaches or compartments therein without discrimination in quality, conveniences and accommodations for the travel or transportation of white and colored passengers.

Where the company has furnished the kind of cars or coaches which the law requires, section 799, Kentucky Statutes, imposes the duty on the conductor or manager of the railroad to assign the white and colored passengers to their respective coaches or compartments therein.

Section 800 provides a penalty to be imposed on the conductor or manager for his failure to discharge the duty required of him. This is not a proceeding to recover damages of the company for a wrongful act of its agent or employe. It is a penal prosecution to impose a fine against the company for the alleged violation of a statute. The company can not be fined for an act of those whom it puts in charge of a train because they may have violated a penal statute. The failure to furnish the coaches for the transportation of white and colored passengers of the kind required by the statute is an offense of the company. A failure to assign the white and colored passengers to their respective coaches or compartments is an offense of such conductor or those in charge of the train.

For the offense of the company the conductor can not be convicted and fined. Neither can the company be convicted and fined for the offense of the conductor or those in charge of the trains, as is the result of this prosecution. The court should have told the jury to find for the defendant.

The case is reversed for proceedings in conformity with this opinion.

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CASE 94—PETITION ORDINARY—SEPTEMBER 29.

The National Oak Leather Company v. The Armour-Cudahy Packing Company.

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APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. SALES—VENDOR AND VENDEE—COUNTER-CLAIM.—The general doctrine is that when the vendee of goods uses them, he thereby accepts them, and can not recover for defects discovered before they were used; but where he had paid the purchase-price in advance upon the faith of the vendor's warranty, and before the defects were discovered or opportunity for their discovery offered in the ordinary course of business, and had given prompt notice to the vendor of the defects when discovered, which defects were substantially admitted, in a suit against him by the vendor for the price of a bill of goods subsequently received, he may be allowed to set up in his answer and counter-claim damages by reason of the defects in the first goods shipped.
2. INDEMNITY—VENDOR AND VENDEE.—Ordinarily the vendee can not prescribe the conditions on which he will return or surrender the goods, the quality of which he asserts does not satisfy the contract, but in this case where the original claim for damages remained unpaid, and necessary expenses having been incurred in preserving the goods, it had a right to retain part of the goods as indemnity for loss.

   The vendor being a non-resident of this State without property therein, the vendee was not required to let the whole or any part of its indemnity get out of its control or go to ruin.

BARNETT, MILLER & BARNETT FOR APPELLANT.

1. A purchaser of raw hides, bound in packs and shipped by car, is entitled to a full and fair opportunity of inspecting them before he is called upon to accept or reject them. Such a "receiving" is

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not an "acceptance" of the hides so as to make the purchaser the owner of them.

The first judgment entered on June 23, 1892, immediately upon the conclusion of the trial, awarding defendant $117.39 upon its counter-claim and set-off, was sustained both by the law and the evidence. It was error to set it aside, and this court should now direct it to be re-entered. (Benjamin on Sales (4th Am. ed.), secs. 140, 1049, and 1051; Jones v. McEwan, 91 Ky., 373; Dana v. Boyd, 2 J. J. M., 594; O'Bannon v. Relf. 7 Dana, 320; Kerr v. Smith, 5 B. M., 553; Overman v. Nelson, 15 Ky. L. Rep., 92; Mattingly v. Matthews, 14 Ky. L. Rep., 300; Caulkins v. Hellman, 47 N. Y., 449.)

2. The plaintiff being a non-resident of Kentucky, without any property in this State, subject to execution, the set-off and the counter-claim were properly pleaded and tried in this case. (Taylor v. Stovall, 4 Met., 175; Forbes v. Cooper, 88 Ky., 285.)
3. This common law action was tried on June 23, 1892, and judgment was rendered for defendant (appellant) upon its counter-claim and set-off, for $117.39. On the same day plaintiff (appellee) filed grounds, six in number, and moved for a new trial, which was then overruled and time given to file a bill of exceptions. It was error to set aside that judgment on July 11, 1892, and then after holding up the case until October 1, 1894, more than two years, reverse the whole proceedings, dismiss the counter-claim, and give judgment for plaintiff for $352, without a new trial having been actually had. (Houston v. Roach, 11 Ky. L. R., 52.)
4. It is well settled in Kentucky that money paid by mistake may be recovered back. The counter-claim alleges mistake on the part of the defendant in paying the money, and fraud on the part of the plaintiff. (Ray, &c., v. Bank of Kentucky, 3 B. M., 510; Underwood v. Brockman, 4 Dana, 309; City of Louisville v. Zanone, 1 Met., 151; City of Covington v. Powell, 2 Met., 226; City of Louisville v. Henning, 1 Bush, 383; City of Louisville v. Anderson, 79 Ky., 334; McMurtry v. Ky. Central R. R., 84 Ky., 465; City of Newport v. Ringo, 87 Ky., 635.)

GIBSON & MARSHALL FOR APPELLEE.

1. Receipt of goods will be treated as acceptance by the buyer if he be guilty of any act which he would have no right to do, except as the owner of the goods. After accepting the goods the vendee

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can not claim a deduction from the contract price on the ground that they were not of the quality called for in the contract. In this case appellant, several months after full knowledge of the alleged defects in the hides, converted them into leather for its own use. (Parker v. Palmer, 4 B. & Ald., 387; Chapman v. Morton, 11 M. & W., 534; Cream City Glass Co. v. Friedlander 54 N. W. Rep.; Mattingly v. Matthews, 14 Ky. Law Rep., 300; Overman & Schrader v. Nelson, 15 Ky. Law Rep., 92; 12 Ky. Law Rep., 996; 2 J. J. M., 594; 7 Dana, 320; 5 B. M., 553.)

2. A purchaser can not refuse to accept goods, and accompany his rejection with conditions and terms upon which he will settle. He must either accept in whole or reject in whole. He can not select such of the articles as he might approve and arbitrarily throw the others back on the hands of the seller.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

This suit was brought by the appellee to recover of the appellant a balance alleged to be due on the purchase of a car load of native steer hides, shipped from South Omaha, Nebraska, to the appellant at Louisville, Kentucky.

The defense interposed was that on a former shipment of similar hides, and which had been paid for before opportunity for inspection and in fact before receiving them, the appellant was entitled to some $186 in damages by reason of the hides being inferior in quality to that warranted by the appellee, and further that material defects existed in the hides last shipped, and for which the suit had been brought, to the damage of appellant in the sum of $282, and that on an adjustment of accounts the appellee owed appellant $117.30. Upon a trial of the issues formed by the pleadings the court, without the intervention of a jury, found for the appellant in the sum of its counterclaim, but subsequently reversed its rulings and entered judgment for the appellee in the total sum claimed.

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This latter finding, however, was not because of a lack of proof showing the inferior quality of the hides, for of the first car the court said: "When the car reached the city of Louisville, while the hides were being fleshed and inspected and examined by the defendants, it was found that one of said hides was that of a work ox, worth two cents per pound less than the price charged; that eight were hides of bulls, worth two and three-fourth cents per pound less than charged; that twelve were branded and worth one cent per pound less than charged; that 264 were badly cut and worth one cent per pound less than the price charged, and that said defects lessened the value of the car load of said hides by the sum of $186.40."

And of the second car the court said: "Said hides were examined and inspected by defendant, and 358 of them were found unnecessarily dirty, long haired, of inferior quality and under weight."

But the court finally denied the relief sought by the counterclaim, and to which the defendant had shown itself entitled by the proof, on the ground that "the defendant, by using the hides, accepted them," and it could not, therefore, recover for defects alleged to have been found before they were used.

This is clearly the general doctrine, but in this case the appellant had paid the purchase price for the first car load of hides on the faith of the appellee's warranty. The hides were received in the early part of July, 1889, and in due course went into the beam-house early in August. While in here the defects were noted. They could not have been discovered before in the ordinary run of the business. Notice of the defects was at once forwarded to appellee and damages demanded. The appellee responded in effect admit-

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ting the inferior condition of the hides and promising a better showing on the second car load.

It said: "We had much reason to be dissatisfied with the take-off of our hides, and we have discharged the man who has been in charge of it. We have now one of the best men," etc.

The claim for reclamation was not denied, and while there is no express promise to allow it, such a promise is easily inferable. In a few days, however, the second car arrived, and the hides were found in worse condition than the first. After a further correspondence and the payment of a considerable sum for expense of preserving the hides so that they might be of some value to whomsoever might finally get them, the appellant agreed to deliver to the Ohio Falls Oak Leather Co., at the direction of the appellee, all the hides except eighty, which it proposed to reserve to pay damages. This offer was refused. Finally, all plans of adjustment failing, and the appellee at no time tendering or offering to make good the admitted damages accruing to the appellant, and it becoming manifest that the hides were about to spoil, the appellant sent to the appellee the price of the hides as stipulated in the contract, less its claim for damages as stated, and proceeded to use them in order to save them.

Keeping in mind that the vendor was a non-resident and without property in the State, we are at a loss to see what the appellant could have done in this case other than what it did do. Certainly it was not required to reject the first car load and look to the non-resident vendor to pay back the purchase price. Moreover, as we have seen, it was a most natural conclusion from the letters of the appellee that the claim for damages on that car load was admitted and would

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be paid or allowed on the next settlement between the parties.

When sued for the price of the second load we perceive no reason why this admitted claim should not be allowed. As to the second load it may be conceded that ordinarily the vendee may not prescribe conditions on which he will return or surrender the goods, the quality of which, he asserts, does not satisfy the contract, but here the original claim was unpaid and other necessary expenses had been incurred, and certainly the vendee might at least retain the eighty hides as indemnity for his loss. When he offered the balance to appellee the offer was refused, and we think no law required him then to let the whole or any part of his indemnity get out of his control or go to ruin.

The first judgment ought not to have been set aside, and the judgment appealed from is reversed to the end that the original judgment may be re-entered.

CASE 95—PETITION EQUITY AND PETITION ORDINARY—SEPTEMBER 29.

Gaar, Scott & Company v. Lyons, &c.

Same v. Same.

APPEALS FROM HARDIN CIRCUIT COURT.

1. MORTGAGED PERSONAL PROPERTY—ATTACHMENT THEREOF BY MORTGAGOR—REMEDY.—Section 249 of the Civil Code provides the exclusive remedy by which a mortgagor may attach mort-

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gaged personal property, and prescribes the reasons for which an attachment may be issued against such property; and it can not be levied on under a general attachment, and the mortgagee deprived of the possession thereof, when, under the terms of the mortgage, he is entitled thereto.

2. EXEMPTION.—The levy of a general attachment procured by a mortgagor and levied on the mortgaged personal property which was exempt from attachment, was properly quashed; but the grounds of attachment not being controverted, the attachment itself should not have been discharged.

3. CONVERSION—ACTION FOR RECOVERY OF PERSONAL PROPERTY—MEASURE OF DAMAGES.—In an action for the recovery of personal property wrongfully taken under an attachment, and damages for the taking and detention thereof, it appearing that the property was mortgaged, the plaintiff was only entitled to recover damages for the detention up to the date of a judgment of foreclosure, at which time his right of possession ceased, and not up to the time of the trial of his action for damages.

S. H. BUSH FOR APPELLANTS.

1. There is nothing in the provisions of section 249 of the Civil Code giving a mortgagee of personal property a right to a specific attachment against the mortgaged property under the circumstances and conditions therein named, which is inconsistent with his levying a general attachment on such property, or which takes away the right to levy a general attachment on the mortgaged property. Any creditor has the right to levy a general attachment upon mortgaged personal property, and why may not the mortgagee have the same right?

2. The grounds of attachment not being controverted, the court should not have discharged the attachment. (Bell v. Mansfield, 12 Ky. Law Rep., 89; Spalding v. Sims, 4 Met., 285; Powell v. Cummins, 7 Ky. Law Rep., 361.)

3. The instruction in the common law action telling the jury that appellee was entitled to damages for the detention of the property up to the date of the trial was erroneous. He was certainly not entitled to damages for such detention beyond the time his right of possession ceased, which was the date of the judgment of foreclosure, or at most the date of the sale thereunder.

4. In a suit for wrongful conversion of personal property, where the

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conversion is not accompanied with malice, the measure of damages is the value of the property at the time of conversion with interest thereon from that time. (Sedgwick on Damages, pp. 547 and 577; Lillard v. Whittaker, 3 Bibb, 92; Sproule v. Ford, 3 Littell, 25; Outten v. Barnes, Littell's Select Cases, 137; Greer v. Powell, 1 Bush, 489; Harris v. Davis, 13 Ky. Law Rep., 736; Wolf & Co. v. Hunter, 15 Ky. Law Rep., 846; Peak v. Inlow, 8 Dana, 192; Alsop v. Adams, 8 Ky. Law Rep., 746; Goodwin v. Prunnell & Co., 11 Ky. Law Rep., 140; Merchand v. York, 10 Ky. Law Rep., 777.)

5. In an action subject to be defeated by a set-off, the claim of the plaintiff's attorney of a lien for services must yield to the set-off as it would to any other available defense to the action. A claim for unliquidated damages may be pleaded as a set-off where the plaintiff is insolvent. (Taylor & Son v. Stowell, &c., 4 Met., 174; Forbes & Bro. v. Cooper, 10 Ky. Law Rep., 865.

S. H. BUSH AND J. P. HOBSON IN PETITION FOR RE-HEARING.

1. Under the provisions of section 194 of the Civil Code *any* contract creditor may have a general attachment; this, of course, includes mortgagees. Section 249 gives mortgagees a further and special right not given to others. The two provisions should be construed as cumulative and not conflicting, unless the contrary appears. It might be that the mortgagee would have grounds for the general attachment and not for the specific.

2. The general rule of law is that for the taking or conversion of personal property, the measure of damages is the value of the property at the time of the taking, and interest on it from that day. (1 vol. Barbour's Digest, p. 443, secs. 177 and 178; Newcomb v. Baskett, 14 Bush, 667; Banks v. Joyce, 78 Ky., 42.)

3. The plaintiff had a right to plead its debt as an equitable set-off against defendant's claim for unliquidated damages. (Forbes v. Cooper, 88 Ky., 285.) And if the plea of set-off had been allowed before judgment, it would have have defeated a recovery altogether, and there would be nothing for the attorney's lien to attach to.

MONTGOMERY & BARRY FOR APPELLEE.

1. The appellants had a mortgage on the property which held it for them without an attachment. No affidavit that the defendant

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was a non-resident or had no property, etc., would authorize the levying of a general attachment upon property which he already has a hold upon by mortgage.

2. The right of attachment is statutory and is a harsh remedy which must be strictly pursued; and when a certain kind of remedy by attachment is prescribed by statute, it excludes all others.
3. In the common law action, all the instructions given by the court are not in the record on appeal, and, therefore, none of them can be considered by this court.
4. The right to damages is incidental to the right of restitution, and must accompany it up to the time of restitution. (Bates v. Bohannon, 2 Bush, 117; Thomas v. Blunt, Littell's Select Cases, 114; Rodgers v. Bradford, 8 Bush, 163.)
5. The appeal should be dismissed because the judgment is satisfied. The amendment to the Code gives a plaintiff the right to appeal when he fails to recover all he has sued for, although he has collected the part recovered; but there is no provision authorizing the defendant to do so after satisfying part of the judgment as is done in this case by the set-off.

L. A. FAUREST ON SAME SIDE.

1. The statutes provide when and how an attachment can be obtained in order to *create* a lien upon property when the debt is due; how an attachment may be obtained in certain actions to *create* a lien when the debt is not due, and how property upon which there is *already a lien* may be by attachment protected and preserved. In all such cases a complete remedy is provided, and no one of the remedies should be applied to any of the cases other than the one for which it was specially intended. (Johnson v. Bush, 11 Bush, 527.)
2. The common law action was one for the recovery of specific personal property, and is not like an action for conversion where the value of the property at the time of the conversion with interest to the time of judgment is the measure of damages. In actions like this the plaintiff is entitled to recover his property, or if not to be had its actual value, and his *actual* damages up to the day of the trial. (Bates v. Bohannon, 2 Bush, 117.)
3. Section 107, Kentucky Statutes, gives an attorney a lien upon a judgment recovered by him for the amount of the fee agreed upon

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with his client, and this lien can not be defeated by setting-off another judgment against the judgment which he recovered. (Robertson v. Shutt, 9 Bush, 659.)

JUDGE LANDES DELIVERED THE OPINION OF THE COURT.

These two cases were by agreement heard in this court together. The first is an appeal from the judgment of the Hardin Circuit Court, rendered in an action brought by the appellants against the appellee to recover on two notes, for $200 each, executed by the appellee for a separator, fixtures and appurtenances, which were secured by a mortgage on the same property, a yoke of oxen and a small parcel of land in Breckinridge county, and to subject the mortgaged property to the payment of the notes.

At the commencement of the action a general attachment was sued out by the appellants on the ground that the appellee had no property in the county of Hardin, or in the State of Kentucky, subject to execution, or not enough thereof to satisfy the claims sued on, and that the claims would be endangered by delay in obtaining judgment and return of no property found.

The writ of attachment was placed in the hands of the sheriff, and was levied upon the personal property embraced in the mortgage, which was sold by a special commissioner under an order of the county judge of Hardin county, made upon due notice, at the instance of the appellants, and the sale was duly reported by the commissioner.

It was expressly provided in the mortgage that the appellee might hold and use the personal property in Hardin, Breckinridge and Meade counties.

Without attempting to give in detail all of the steps that were taken in the action, it is sufficient for the purposes of

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this case to say that there was no defense to the action, and that the grounds of the attachment were not controverted, but the court below, on the motion of the appellee, quashed or "discharged the levy" of the attachment, and "set aside the sale of the attached property," made in pursuance of the order of the county judge above recited, for the reason, as it appears, that the property covered by the mortgage to secure the debt sued on was not subject to and could not be taken under the general attachment sued out in the action.

Afterwards, the case being submitted, the court rendered a judgment in favor of the appellants for their debt, and subjected the mortgaged personal property, described in the judgment as a "separator, 10,642, on wagon, with folding stacker, belts and usual appurtenances; also one yoke of oxen, about six years old;" and directed that it should be sold for that purpose by a special commissioner appointed in the judgment, and the court, "on its own motion, discharged the attachment herein." This action of the court discharging the attachment, and the order previously made by the court "discharging the levy and sale" of the same property under the same attachment, were excepted to by the appellants, and are here urged as error by counsel.

Since under the mortgage, as we have seen, the appellee had the right to retain the possession of and to use the personal property embraced in it, he could not be lawfully deprived of this right before judgment in the action ascertaining the amount the appellants were entitled to recover, and subjecting the property to the satisfaction of the judgment, except in the manner provided by law.

Undoubtedly the appellants had the right, if proper grounds existed and if it were necessary to secure their whole debt, to sue out a general attachment, but we hold

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that the property mortgaged to secure their debt could not be levied on, nor could the appellee be lawfully deprived of the possession or use of it under a general attachment.

Ample provision is made for cases of this kind by section 219 of the Civil Code, which provides that "in an action to enforce a mortgage of or lien upon personal property, . . . if it satisfactorily appear from a verified petition or from affidavits or the proofs in the cause that the plaintiff has a just claim, and that the property is about to be sold, concealed or removed from the State; or if the plaintiff state on oath that he has reasonable cause to believe, and does believe, that, unless prevented by the court, the property will be sold, concealed or removed from the State, an attachment may be granted against the property."

The existence of none of the grounds for the specific attachment allowed by this section of the Code were made to appear, and, consequently, no reason was shown why the property should be taken from the possession of appellee at the time the attachment was sued out. The court below, therefore, properly quashed the levy and set aside the sale of this property made under the general attachment; but as the appellants had the right to sue out a general attachment the court erred in discharging the attachment when the grounds of it were not controverted and no party in interest had moved for the discharge. The attachment ought to have been sustained. (Civil Code, section 261.)

The appellants, however, have not shown and the record does not discover that their substantial rights were prejudiced by this erroneous action of the court, and the judgment can not, therefore, be reversed on account of it.

The second case was an action in the Hardin Circuit Court, brought by the appellee against the appellants, to recover

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the separator and the yoke of oxen, upon which the attachment in the first case was levied and which were described in the mortgage and judgment in that case, and therein subjected and directed to be sold to pay the appellants' claim, together with damages for the taking and detention of said property.

This property, as we have seen, was taken from the possession of the appellee under the said general attachment, and was sold by order of the county judge, and the levy and sale discharged and set aside by the court below.

The judgment of the court directing the sale of this property to satisfy the claim of the appellants was rendered on the 6th day of December, 1893, and the action for the recovery of the property and damages for taking and detaining it was commenced on the 6th day of February, 1894. The jury, under what may be termed a peremptory instruction, found a verdict for the appellee, fixing the value of the separator at $275, and the value of the yoke of oxen at $50, or $25 for each ox, and assessed the damages at $180, and the court adjudged that the appellee recover of the appellants the separator and the yoke of oxen, if to be had; and, if not to be had, the value of each, as fixed by the jury, and $180 damages, and costs.

This judgment the appellants moved the court to "set-off" against their judgment rendered against the appellee in the first case, but the attorney for the appellee objected to this motion and asserted his lien on the judgment for his fee in the case, for which he had a written contract.

The court upon hearing these motions, adjudged that "Gaar, Scott & Co., have a prior lien upon the oxen and separator for their judgment against said Lyon, and that" the attorney, "James Montgomery, has a prior lien upon

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the $180 adjudged as damages for the amount of his fees agreed to be paid by W. N. Lyon herein adjudged to amount in value for more than said amount of $180."

It was accordingly ordered that the judgment of the appellants against the appellee be credited with $325, the value of the separator and yoke of oxen as fixed by the jury, as of date the 14th day of November, 1894, and that the appellants pay to the attorney the said sum of $180, the amount fixed as damages by the jury, all of which was duly excepted to by the appellants. The court having overruled the appellants' motion for a new trial, this appeal is prosecuted to reverse that judgment.

The court below, at the instance of the appellants, having directed their judgment in the first case to be credited with the amount of the judgment recovered against them by the appellee in the second case for the value of the property sued for as fixed by the jury, the appellants are in no attitude to complain of the refusal of the court to credit their judgment with the further sum of $180 damages fixed for the taking and detention of the said property if the said damages were properly assessed and recovered. Unquestionably the attorney, under his contract exhibited in the record, and under the statute in such cases, had a lien upon the amount recovered in the action, and we are not prepared to say that under the contract referred to the amount of the damages, if properly assessed, was greater than ought to have been allowed to the attorney for his services in the case, or that the court below erred in allowing to the attorney a prior lien thereon for his fee. But the material question arises upon the exception taken by the appellants to the instruction of the court under which the damages were assessed.

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Counsel for the appellants made no question in the court below as to the right of the appellee to recover the property, and that question is not before us. Indeed it appears from the record that the right to recover it was conceded by counsel for the appellants, the only question made being as to the time to which damages were recoverable. The court, in the instruction given and excepted to, after telling the jury that the property in controversy belonged to the appellee at the time it was seized under the attachment, that the taking and selling it by the appellants was wrongful, and that they should find for the appellee the said property and fix its value, further told them that they should find for the appellee such actual damages as they believed from the evidence the appellee had sustained "by reason of the unlawful taking and detention of the property up to this time"—that is, up to the date of the trial, which was November 13, 1894.

This instruction was erroneous so far as it allowed the recovery of damages in the action for the taking of the property, and so far as it attempted to fix the time to which damages for the detention of the property might be recovered.

Conceding that the appellee had the right to the possession of the property at and after the time it was taken from him under the general attachment, that right did not extend beyond the date of the judgment subjecting the property to sale for the payment of the claim of the appellants, which was the 6th day of December, 1893. For, if the property was then or afterwards in the possession of the appellee, or whether it was in his possession or not, it was subject to the right and duty of the special commissioner, who was appointed and directed by the judgment of the court to sell

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it, to take it into his own possession. It follows from this that the damages for the detention of the property were not recoverable for any period beyond the time when the appellee's right to the possession of the property terminated. And in this action damages were not recoverable for the mere trespass committed in the unlawful seizure of the property. (Civil Code, section 388.)

For the reasons given the judgment in the first case is affirmed, and the judgment in the second case is also affirmed except for the recovery of the $180 damages, and that part of the judgment is reversed and the cause remanded, with directions to award the appellants a new trial as to the damages for the detention of the property which was in controversy in the action, and for further proceedings consistent with this opinion.

The following response, overruling a petition for rehearing, was delivered October 13, 1896:

Per curiam. Upon a review of the records in these cases the court adheres to the opinion which has been delivered.

Section 249 of the Civil Code, providing a remedy by specific attachment in an action to enforce a mortgage or lien upon personal property, was not intended to be cumulative or in addition to the remedy afforded by an ordinary or general attachment in respect of the specific property embraced in the mortgage or covered by the lien sought to be enforced. It was intended to enable the mortgagee or lien-holder to secure the property, under the conditions named in the section, so that his rights acquired in the transaction by which the lien was created on it may be enforced without regard to its being subject or not subject to execution or attachment for debt.

Property not subject to execution may be mortgaged by

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the owner of it, and yet be exempt from execution or general attachment for debt. So that, as held in the opinion, the remedy provided by the section is ample and complete, and, being specific, is exclusive, in respect of the mortgaged property, of all other remedies.

As regards the measure of damages, counsel have stated the rule correctly in the case of conversion of personal property. But this was not a case of conversion. The original petition was, in effect an action to recover damages for trespass in unlawfully taking the property. But the amended petition changed the action so as to make it an action for the recovery of the property and damages for the detention of it. This was done without objection on the part of counsel for the appellants, who conceded, as stated in the opinion, that the appellee was entitled to recover it. So that the only question as to damages was the time to which a recovery might be had. And for the reason that, by the express provisions of the mortgage, the appellee had the right to retain and use the property, the opinion holds that the damages for the detention of the property could be estimated only to the date of the judgment subjecting it to sale to enforce the liens. In such a case damages for detention, but not for taking the property, are recoverable by the plaintiff as provided in section 388 of the Civil Code.

As regards the right of set-off, the opinion does not hold that it did not exist. But, under the statute, it is held that the attorney for the plaintiffs (appellee here) had a lien on the judgment or the amount recovered to secure his fee under his contract, and this we think is well settled. (Kentucky Statutes, section 107; Robertson v. Shutt, 9 Bush, 659.)

The petition for rehearing and modification of the opinion overruled.

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CASE 96—PETITION ORDINARY—SEPTEMBER 30.

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c118 272

99 684
c127 744

Illinois Central Railroad Company v. Hilliard.

APPEAL FROM HICKMAN CIRCUIT COURT.

1. RAILROADS—FELLOW-SERVANTS.—The conductor of a freight train and one employed by a railroad company to inspect each car of a train and ascertain if it is in safe condition, are not fellow-servants in the sense of being upon a common footing and agents of each other. They acted in different spheres and neither could or was required to know whether the other did his duty.
2. GROSS NEGLIGENCE.—A jury should not be required to believe that a car inspector had been guilty of gross negligence in his examination of cars, before one injured by reason of defective appliances thereon can recover. The simple inquiry should be, did the company, through its inspector use ordinary care in examining the cars so as to ascertain whether the appliances were in a safe condition.
3. CONTRIBUTORY NEGLIGENCE—LATENT DEFECT—DUTY OF CONDUCTOR.—While it is the duty of a conductor to examine the condition of a train before taking charge of it, he could not reasonably be required or expected to make such a close and minute examination as to discover a latent defect. There is a difference in the degree and character of examination required of a car inspector, who is employed for that special purpose, and that required of a conductor.

GEO. L. HUSBANDS FOR APPELLANT.

1. As between a railroad company and its employes, the company is bound to the use of ordinary care and prudence only in the inspection of its cars and appliances; and the established rule is

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that where an injury is the result of a latent defect of which the company has no prior knowledge,and which was not discoverable by the exercise of ordinary care, the company is not liable. (Wood on Railroads, vol. 3, p. 1729.)

2. When one enters upon an employment for another he assumes all the ordinary risks attendant upon it; and when a number of persons enter a common employment for another, all being upon a common footing, and one receives an injury by the neglect of another, they are regarded as the agents of each other, and no recovery can be had against the employer. (Wood on Railroads, pp. 173 and 1723; L. & N. R. R. Co. v. Moore, 83 Ky., 683.)
3. The car inspector and conductor were fellow-servants with reference to car inspection; they were both required under their contracts of employment to inspect cars before they were used.
4. It was the duty of the conductor to have examined the train before starting on the trip, and if he failed to find such defects as ordinary care would have discovered, he was guilty of contributory negligence and can not recover. The fact that there was a regular car inspector, whose duty it was to inspect the cars and appliances, does not relieve him from this duty. (Wood on Railroads, vol. 3, sec. 372.)

WILLIAM LINDSAY OF COUNSEL ON SAME SIDE.

1. It is not neglect in the master if a tool or machine breaks, whether from an internal and original fault not apparent when the tool or machine was first provided, or from an external apparent one produced by time or use not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself. When a rule or custom of the service requires a conductor to examine the cars composing his train, his failure to do so is negligence on his part and will prevent recovery for an injury which a proper examination might have prevented. (Wood on Railroads, vol. 3, sec. 372.)
2. Upon the testimony of the appellee himself the jury should have been instructed to find for the defendant upon the ground that he not only did not prove negligence upon the part of the company, but himself proved that the ladder and rounds were in apparently safe condition at the time he took charge of the car, and the defect, if any, was a latent one which could not have been discovered by any such examination as ordinary prudence requires.

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3. The plaintiff in his pleadings makes no claim for damages on account of moneys paid for board, doctors' bills and medicines, and yet the court in its instructions authorized the jury to award damages for these things.

THOMAS E. MOSS FOR APPELLEE.

1. The conductor and car inspector are in no sense fellow-servants; their duties are essentially different, are in different spheres and performed at different times and places, and they are not in the same line of service or in the same department. (Voltz v. C. & O. Ry. Co., 15 Ky. Law Rep., 728; L. & N. R. Co. v. Davis, 14 Ky. Law Rep., 716)
2. The servant has a right to presume that the master will do his duty, and acting upon this presumption, is not chargeable with contributory negligence. (32 Minn., 250; 20 N. W. Rep., 147; 34 N. W. Rep., 311.)
3. The law charges the master with knowledge of that which he ought to have known, and he ought to know that which, by the exercise of due and reasonable care, he could have discovered. (Braun v. Chicago, &c., R. R., 53 Iowa, 595; Bossex v. Ry. Co., 45 Wis., 477.)
4. When a defect has existed in appliances for any length of time, knowledge thereof upon the part of the master may be presumed from that fact alone. (Deppe v. R. R. Co., 36 Iowa, 52; Baldwin v. R. R. Co., 68 Iowa, 37; 52 N. W. Rep., 918.

THOS. G. POORE AND THOS. H. HINES OF COUNSEL ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

E. V. Hilliard was employed as conductor of a freight train of appellant, the Illinois Central Railroad Co., which left Mounds Station of that State October 5, 1893, going southward, but just before reaching Clinton, Kentucky, the train, moving at about the rate of five miles per hour, broke apart, and Hilliard, being on the top of the cars, thereupon started to descend to the ground on a ladder fixed at the end of one of the cars, when a round thereof as he grasped it

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gave way, in consequence of which he fell and one of his hands was so crushed by a wheel as to necessitate amputation.

It is not contended that he was, under the circumstances, out of his proper place or negligent, or outside his line of duty in attempting to descend in the manner and time that he did; nor is there dispute about his fall and injury resulting from insecure fastening of the round which he had to take hold of in order to descend. The questions, therefore, are whether the railroad company was guilty of actionable negligence, and if, or although it was, whether Hilliard as conductor was guilty of such contributory negligence as that but for it the fall and injury would not have occurred, and those questions involve an inquiry as to the respective and relative duties of the two parties.

As the lower court instructed the jury, it was the duty of the company to provide and keep in good and safe condition the ladders attached to the several cars; and, as it further instructed, if at the time plaintiff was hurt the ladder in question was in an unsafe condition and defendant knew it, or by the use of ordinary care could have known it in time to put the same in a safe condition, and the injury resulted from such condition of the ladder, then plaintiff was entitled to recover, unless plaintiff knew, or by exercising ordinary care could have known, the ladder was in such condition.

Defendant asked but the court refused to give the following instruction: "That the car inspector of the defendant and the plaintiff as conductor of the freight train upon which the accident happened were fellow servants, engaged in the same line of service as to the inspection of the cars in said train, and, though the jury may believe from the evidence that said inspectors were guilty of negligence in the

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inspection of said cars, yet they can not find for plaintiff unless they believe said negligence was gross negligence."

That instruction was properly refused because abstract and misleading. In the first place the person employed at Mound Station to inspect each car of a train and ascertain if it is in a safe condition was not a fellow servant of plaintiff in the sense of being upon a common footing and agents of each other. They acted in different spheres, and neither could or was required to know whether the other was properly doing his duty. In the second place it would have been improper to require the jury to believe the inspector was guilty of gross negligence. The simple inquiry was, as they had been instructed, whether the company, through its inspector, used ordinary care in examining the cars so as to ascertain whether the ladders attached to each were in a safe condition; for it was the legal duty of the company to guard against every source of danger they could, by the exercise of that kind and degree of care, foresee and prevent; and while a railroad company can not be required to insure the safety of a train, it is bound to make a reasonable, proper and careful examination of each car.

The evidence in this case shows that the bolt which held the defective round of the ladder was so rusted and worn that the tap slipped off when the plaintiff grasped the round. And the jury might have reasonably concluded that the inspector could and would, by using the proper and reasonable care, have discovered the fact, and having failed to do so legal liability of the company was fixed.

On the other hand the conductor, while required to examine the condition of a train before taking charge of it, could not be reasonably required or expected to make such close and minute examination as to discover a latent defect.

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If the ladder had been detached or out of place it would have been plaintiff's duty to have discovered it. There is plainly a difference in the degree and character of examination of the cars required of the inspector who is employed for that special purpose and that required of a conductor. If there was not there would be no use for an inspector.

Perceiving no error of law on the trial of this action, the judgment is affirmed.

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INDEX.

ACCIDENT INSURANCE—

1. Under an accident policy insuring one against injuries effected through "external, violent, and accidental means," if, as to the person injured, the injury was unforeseen, unexpected, not brought about through his agency, designedly, or was without his foresight, or was a casualty or mishap not intended to befall him, then the occurrence is accidental, and the injury one inflicted by accidental means within the meaning of the policy. American Accident Co. v. Carson 441
2. Where such a policy insures against death or injury by "external, violent and accidental means," and there is a provision that it shall not "extend to or cover intentional injuries inflicted by the insured or any other person," the exception refers only to non-fatal injuries so inflicted. *Idem*..... 441
3. When an accident policy provides that if the insured is injured or killed in any occupation or exposure, classed by the company as more hazardous than that recited in the application, the insured or his beneficiary is only to get a reduced sum, in an action by the beneficiary on the policy for the full amount thereof, he must allege that the insured was not killed while engaged in an occupation more hazardous than that stated in the application. *Idem* 441

ACCOMPLICE—

As to right to testify, although convicted of crime. See Criminal Law, 5.

As to what evidence, in addition to his, is necessary. See Criminal Law, 6.

ACCORD AND SATISFACTION—

As to when plea not good. See Pleadings, 4.

ADJOINING LANDS—

As to when debtor entitled to homestead in, where the house is on the wife's adjoining lands—See Homestead, 1.

ADJOURNMENT OF COUNTY COURT—

As to power of county court to adjourn from day to day. —See County Courts, 1, 2.

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AGENT—

As to filing suit "as agent," without disclosing nature of agency. —See Practice in Civil Cases, 4.

ALIENATION—

As to right to convey notwithstanding restriction thereof in deed—See Vendor and Vendee, 1.

ALIMONY—

1. Section 2123 of the Kentucky Statutes, which prohibits a chancellor from making an order or rendering a judgment in a divorce suit, "which shall divest either party of the fee-simple title to real estate," does not prohibit the levying of an execution on such real estate for the purpose of collecting an allowance for alimony. Tyler v. Tyler 31

ALLEYS—

As to closing by municipality for purpose of allowing land therein to revert to abutting property owners—See Public Ways, 1.

As to apportionment of cost of construction of—See Public Ways, 3.

AMENDED PLEADINGS—

As to practice on filing—See Practice in Civil Cases, 2.

1. In an action on a bail bond, where a demurrer was sustained to the defendant's answer, and he did not ask the court to permit him to amend the same, and offered no amendment containing a good defense, the court properly rendered judgment against him. Wilson v. Com. 167

As to right to amend grounds in contested election case—See Contested Elections, 1.

As to filing of at close of evidence—See Practice in Civil Cases, 10.

APPEALS—

As to manner of testing validity of municipal ordinance by—See Ordinance, 1.

A judgment in a proceeding *in rem* against property may be appealed from, although for less than $100—See Judgments, 3.

1. The Legislature has the power to designate in what class of cases appeals may be taken from the lower courts, and it is expressly provided in the statute under consideration that no appeal shall be allowed from the judgment of the circuit court. Morton v. Woodford, *et. al.* 367

APPORTIONMENT OF COST OF PUBLIC WAY—

—See Public Ways, 3.

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APPROPRIATION—

As to what is sufficient appropriation of debtor's deposit, by bank—See Banks and Bankers, 2.

ARBITRATION AND AWARD—

1. Arbitrators have no inherent power, upon their disagreement, to select an umpire, unless they are authorized to do so by the terms of the submission; and an award made by an umpire so selected is void. Arbitrators derive their power from the articles or agreement of submission, and the umpire must derive his in the same way. Allen-Bradley Co. v. Anderson & Nelson Dis. Co. 311
2. When arbitrators make an award as to matters submitted to them, and attempt in the award to determine matters not submitted to them, the award will be enforced as to the matters submitted, and treated as void as to others. But in this case the whole award being void, this rule has no application. *Idem* 311

ARREST OF DEFENDANT—

As to practice in controverting grounds of arrest in civil action—See Practice in Civil Cases, 3.

ASSAULT AND BATTERY—

1. Where one was indicted under section 1166 of the Kentucky Statutes for assault with intent to kill, charged to have been committed by shooting the one assaulted with a pistol, the court properly refused to instruct the jury that they might find the defendant guilty of assault and battery, although there was evidence that the prosecuting witness was struck in the head with the pistol instead of being shot. Com. v. Heath..... 182
2. While it is true assault and battery is a lower degree of and included in the offense of assault with intent to kill, it does not follow that one indicted for the latter offense only may be convicted and punished under the same indictment for every character of assault or assault and battery, growing out of the facts upon which the indictment may have been found. The general rule is that a charge in an indictment, that an offense was committed in a particular way, or with a certain instrument or means, can not be sustained by evidence that it was committed in a different way or by different means. *Idem*..... 182
3. No one ought to be convicted of an offense of lower degree than that charged in the indictment under which he is tried, unless the evidence would justify a conviction if he were prosecuted under the same indictment only for the lower degree of the offense. *Idem* 182

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ASSIGNMENT—

As to assignment of claim, which is without consideration—See Existing Liability, 1.

ATTACHMENTS—

1. Section 249 of the Civil Code provides the exclusive remedy by which a mortgagor may attach mortgaged personal property, and prescribes the reasons for which an attachment may be issued against such property; and it can not be levied on under a general attachment, and the mortgagee deprived of the possession thereof, when, under the terms of the mortgage, he is entitled thereto. Gaar, Scott & Co. v. Lyon, etc..... 672
2. The levy of a general attachment procured by a mortgagor and levied on the mortgaged personal property which was exempt from attachment, was properly quashed; but the grounds of attachment not being controverted, the attachment itself should not have been discharged. *Idem* 672

BAIL BONDS—

1. The Criminal Code confers upon clerks of circuit courts the power to take bail bonds after the expiration of the term of the circuit court during which the amount of the bail was fixed by the court; and this authority continues to and during subsequent terms of the court. Wilson v. Com. 167

BANKS AND BANKERS—

1. A bank is obliged to pay the checks, drafts and orders of a depositor, so long as it has in its possession funds of his sufficient to do so, and which are not encumbered by the attaching of an earlier lien in its favor, and if it fails or refuses to do so without sufficient justification, the depositor may have his action for damages against it. Mt. Sterling Nat. Bank v. Green..... 262
2. Where the depositor owes the bank a debt, past due, which is larger in amount than his deposit, it is not necessary for the bank upon the presentation of the depositor's check, to appropriate the deposit and supply it as a credit on its debt; the simple question being upon its presentation whether the bank had a right to refuse payment of the same, and if it had, its refusal to honor the check was a sufficient appropriation. *Idem* 262

BILLS OF EXCEPTION—

1. The truth of what the judge of a lower court states or certifies as the bill of evidence may be controverted by the affidavits of by-

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BILLS OF EXCEPTION—Continued.

standers in the form of a bill of evidence, but the Court of Appeals has no authority to consider questions of law made during the progress of the trial of either a civil or a criminal case, unless they appear by the bill of exceptions, regularly approved and signed by the judge, to have been passed on by the court. (Garrott v. Ratliff, 7 Ky. Law Rep., 463.) Patterson v. Com. 619

BOARD OF VALUATION AND ASSESSMENT—

1. The proceedings of the board of valuation and assessment are judicial in their nature, and its findings, if not conclusive, are entitled to a high degree of consideration and authority, and should not be lightly set aside or disregarded by the courts, unless the board proceeded upon an erroneous principle, or adopted an improper mode or manner of estimating the value of the franchise, or unless fraud is charged and shown. Henderson Bridge Co. v. Com. 623

BONDS OF PUBLIC OFFICERS—

1. The county court has the power, notwithstanding the statute requires the bond to be executed by a certain day, to accept the bond on a day subsequent thereto; and having so accepted it, it is then too late to declare the office vacant.

   County courts have the power under the present revenue law to take new and additional bonds at any time. Schuff v. Pflanz 97
2. Both the general official bond and the original revenue bond executed by a sheriff cover the entire term for which he was elected, and not merely one year as contended; and the sureties in them, together with those in the several renewal bonds required, are bound for any default which may occur during the term for which they may be executed. *Idem*..... 97
3. The provision in section 4203 of the Kentucky Statutes that the county court shall have exclusive jurisdiction to grant saloon licenses applies only to the county, and not to incorporated cities and towns, in which express authority to grant or withhold such licenses is granted to the municipal authorities. It is therefore not necessary in a suit on a county clerk's bond to recover for license fees not accounted for, the fees having been collected for licenses granted by municipal authority, to allege that there had been an order of the county court granting the licenses. Schwearman v. Com. 296

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BONDS OF PUBLIC OFFICERS—Continued.

4. A surety on a county clerk's bond is released after seven years, under the provisions of section 2551 Kentucky Statutes, and section 2515 providing that actions for relief on the ground of fraud or mistake shall be commenced within five years next after the cause of action accrued, and the provision of section 2519 that such cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, have no application to actions on official bands of public officers. *Idem*..... 296
5. The fact that there is no order of the county court showing that the sheriff executed an official bond does not affect the validity of his bond for the collection of taxes. Com. for use, Clay Co. v. Howard, &c. 542

BURDEN OF PROOF—

As to instruction upon—See Evidence, 1, 2.

CANCELLATION OF LEASE—

As to, for refusal of lessor to agree to sub-letting—See Lease, 2, 3.

CAPITAL STOCK—

As to what constitutes—See Taxation, 7.

CARS—

As to duty of railroad company to furnish to shippers—See Railroads, 5, 6.

As to duty of conductor to inspect before starting with train—See Railroads, 20.

CARRIERS—See Railroads.

CHARTER—

As to duty of one taking stock in corporation, to take notice of provisions of—See Corporations, 1, 2.

CHECKS—

As to when bank may refuse to pay depositors—See Banks and Bankers, 1, 2.

CHILDREN—

As to degree of care required of them to prevent accident—See Railroads, 11.

CIRCUIT CLERK—

Election to fill vacancy in the office of—See Elections, 2, 3.

As to when he has right to take bail bond—See Bail Bonds, 1.

As to authority of, to issue process directed to city marshal—See Practice in Civil Cases, 6.

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CITY MARSHAL—

As to authority of, to execute process from circuit court—See Practice in Civil Cases, 6.

CLASSIFICATION OF CITIES—

1. The act of September 30, 1892, classifying the cities and towns of this Commonwealth, deals only with those cities and towns which were incorporated by statute prior to that time, and the fact that a place was designated therein as a town of a particular class, did not have the effect to incorporate that town, when it was prior to that merely a civil district. Stephens, et. al., v. Felton, et. al. 395

CODES OF PRACTICE—

Provisions cited, construed, etc.

Civil Code—

Section 39 243
Section 62 330
Section 114 174
Section 121 174
Section 125 251
Section 126 439
Section 134 227
Section 138 268
Section 153 175
Section 157 171
Section 178 175
Section 249 678
Section 261 678
Section 337 621
Section 388 682
Section 489 272
Section 490 272
Section 491 272
Section 606, sub-section 4 589
Section 637 100
Section 667, sub-section 2 270

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CODES OF PRACTICE—Continued.
Criminal Code—
Section 25 354
Section 68 168
Section 94 169
Section 122 187
Section 124 187
Section 219 614
Section 240 617
Section 241 616
Section 257 620
Section 262 .....185, 620
Section 263 185
Section 344 612

CODICIL—

As to construction of—See Wills, 8.

COMMENCEMENT OF ACTION—

1. In an action to have the acts of an insolvent debtor in an effort to prefer one creditor over others declared to operate for the benefit of all his creditors under the statute, it is not a commencement of the action as against the transferee, who is known to plaintiffs to be a non-resident of the State, merely to file the petition and issue summons against him as if he was a resident of the State, within the six months. Traders' Deposit Bank v. Hoffman, et. al. 240
2. The Code furnishes a plaintiff the means and directs the manner in which a non-resident defendant may be properly brought before the court, and if a plaintiff in such an action as this fails to avail himself of the process so provided, within the time prescribed by the statute, his action is not commenced in time to have determined the effect of the act of which he complains. *Idem.* 240

COMMONWEALTH'S ATTORNEY—

As to conduct of, upon criminal trial—See Evidence, 4.

COMPENSATORY DAMAGES—

As to when instruction as to, properly given in action for damages for death caused by negligence or wrongful act—See Pleadings, 77.

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COMPUTATION OF TIME—

1. Under the general local option law which requires the election therein provided for to be held not earlier than sixty days "after the application" for such election is filed with the county judge, the day on which the application is filed should be counted as one of the sixty days. Commonwealth v. Shelton 120
2. The passage by one board of an ordinance on the 5th of April, and by the other on the 19th of April is a compliance with the provision in charters for cities of the first class, that "no ordinance for any original improvement mentioned in this act shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other," the day upon which the first board passed the ordinance to be counted "as one day and part of the time." (Sec. 453, Ky. Stats.) Fehler v. Gosnell 380

CONFESSION—

As to proof of, to corroborate testimony of accomplice—See Criminal Law, 6.

CONSIDERATION—See Plea of no consideration, 1.

As to closing alley by city for purpose of allowing land therein to revert to abutting property owners for money consideration—See Public Ways, 1.

As to assignment of claim, which is without consideration—See Existing Liability, 1.

As to limitation, where there is no consideration for the execution of a deed—See Limitation, 1.

As to pleading of release without—See Pleadings, 3.

CONSTRUCTION OF DEEDS—See Deeds, 1.

1. There being several distilleries in the same vicinity owned by the same man, and using the same pumping station for their water supply, a provision in the deeds of conveyance to separate persons of the several distilleries that "when the property should be operated for use, the cost of operation and the ordinary expenses of repairing incident thereto should be paid by the distilleries using the water from said pump-house in proportion to the quantity of water used, determined by the number of bushels of grain crushed" means that each distillery is required to pay its share of the expenses of the pumping station only

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CONSTRUCTION OF DEEDS—Continued.

while using the water from the station, and not when it procures its water supply elsewhere. Allen-Bradley Co. v. Anderson & Nelson Dist. Co. 311

CONSTRUCTION OF WILLS—See Wills.

CONSTITUTION OF KENTUCKY—

Provisions cited, construed, etc.

Section 28 359
Section 40 88
Section 46 83
Section 55 190
Section 56 87
Section 59 364
Section 60 194
Section 61 ..... 71, 192, 479
Section 64 484
Section 99 103
Section 100 103
Section 103 103
Section 106 651
Section 110 369
Section 126 369
Section 142 70
Section 143 22
Section 144 365
Section 147 478
Section 148 478
Section 152 ..... 479, 551, 558
Section 155 478
Section 157 ..... 476, 511
Section 158 509
Section 160 ..... 453, 494, 551
Section 161 602
Section 167 95
Section 168 ..... 52, 355
Section 171 364
Section 172 638
Section 174 638
Section 181 364
Section 183 215
Section 184 215
Section 227 102
Section 241 408
Section 245 70
Section 246 651
Section 256 484

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CONSTITUTIONAL LAW—

1. The provision in section 168 of our Constitution that "no municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense" applies to offenses only for which a statutory penalty has been fixed. But the offense in question being punishable only at common law in this State, the municipal ordinance may fix a penalty therefor at less than the common law penalty. City of Owensboro v. Simms 43
2. In a local prohibition law it is not necessary that the jurisdiction conferred upon justices of the peace therein should be expressed in the title to the act, because the provisions for the enforcement of the law in the tribunals designated, is not foreign to but is naturally embraced in the subject-matter suggested in the title. McTigue v. Com. 66
3. The jurisdiction of justices of the peace must now be "equal and uniform throughout the State," as required by section 142 of the Constitution, and the general law enacted in conformity to that constitutional requirement operates as a repeal of special acts conferring jurisdiction, the exercise of which is inconsistent with the general law, even if the constitutional provision requiring such uniformity did not of itself effect such repeal. *Idem* 56
4. Section 61 of the Constitution merely stipulates that nothing in the provisions of that section is to interfere with any law relating to the sale or gift of spirituous, vinous, or malt liquors, but does not restrict the effect that is to be given to other sections of the Constitution or the general laws enacted or to be enacted in conformity thereto. *Idem* 66
5. An enrolled bill, when attested by the presiding officers of the two houses of the General Assembly, as required by law, can not be impeached by the journals of those houses, and must be accepted by the courts as the bill adopted by the legislature and as conclusive of the regularity of the steps taken in its passage. Lafferty, &c. v. Huffman, &c. 80
6. Where there was no election in November, 1893, in a town of the sixth class for town trustees, the old trustees held over under the express provisions of section 167 of the Constitution until their successors are elected and qualified. *Idem*..... 80
7. The legislature may authorize a county court to declare the office of sheriff vacant upon the failure of that official to renew either his general official or his revenue bond within a specified time, and consequently section 4131 of the Kentucky Statutes granting this power to the county court is constitutional. Schuff v. Pflanz 97

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CONSTITUTIONAL LAW—Continued.

8. The journals of the House and Senate are not admissible as evidence touching the manner in which an act was passed. Com. v. Shelton 120
9. Section 1899 of the Kentucky Statutes providing for the protection of fish in this State, and the succeeding sections providing how the fines in such cases shall be disposed of, and giving exclusive jurisdiction thereof to the circuit courts is not "special legislation" within the meaning of the prohibitory clause of the Constitution. Com. v. Drain, et. al. 162
10. A bill properly enrolled and signed by the presiding officers of the two Houses and the Governor, will be presumed conclusively to have been enacted into law in the manner prescribed by the Constitution, and the courts will not inquire into the manner of its passage by reference to the journals of the Houses; and the emergency clause being part of the enrolled bill, its validity will be determined in the same way. Com. v. Hardin Co. Court 188
As to taxation of school property—See Taxation, 2, 3.
11. A contested election board has jurisdiction to determine the constitutionality of the act under which the election in question was held; and a judgment by it to the effect that the act under which the election was held is unconstitutional, and the election therefore void, is a final judgment from which an appeal may be prosecuted. Wilson, et. al., v. Hines, et. al..... 221
12. The act of August 6, 1892, known as the Local Option Law, must be taken to have been passed in conformity to all the requirements of the Constitution with reference to the enactment of laws. *Idem* 221
13. When a municipal legislative board is authorized by statute to pass an ordinance affixing a penalty for the violation thereof, it may in its discretion fix the penalty at any sum within the jurisdiction of the police court, provided it is not less than the penalty fixed by statute for the same offense. Thus where the penalty fixed by statute for gaming is "not less than twenty dollars nor more than one hundred dollars," and the penalty fixed by the ordinance is "not less than fifty nor more than one hundred dollars," the ordinance is not in conflict with section 168 of the Constitution, which prohibits municipalities from fixing by ordinance a penalty "for a violation thereof at less than that imposed by statute for the same offense." City of Owensboro v. Sparks. 351
14. While it is probably the policy of our new Constitution to have general laws substituted for local ones, if an inspection of the general act shows an utter absence of legislative intent to

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CONSTITUTIONAL LAW—Continued.

affect the local act, by reason of not embracing its leading and essential features, the courts will not distort the legislative meaning in furtherance of such supposed policy.

In view of that policy the courts may declare the general act to be in substitution of the local ones, when they are satisfied there is a substantial identity of subject matter and purpose in the general and special acts. But in the end the subject of the inquiry is the legislative intent and purpose in passing the general law. Pierce v. Mason Co., et. al. 357

15. Sub-sections 15 and 16 of section 59 of our Constitution, prohibiting the passage of local or special legislation regulating or authorizing the levy and collection of taxes, or authorizing the opening, altering, maintaining or vacating roads, highways, streets, alleys, etc., look altogether to future legislation, and manifestly do not affect, directly or indirectly, the laws already in force; and the existing special legislation on the subjects named in the various sub-sections of section 59, with respect to which special acts are now prohibited, does not stand repealed by the mere force of such prohibition. *Idem*..... 357
16. The Kentucky Statute conferring upon circuit courts the right to establish towns in this State under certain conditions, is constitutional. Morton v. Woodford, et. al. 367
17. In an action under the provisions of section 241 of the Constitution seeking damages for death by negligence or wrongful act—that section being in force at the time of the loss of life, though the legislature had not then provided how the recovery in such cases should go and to whom it should belong—the personal representative of the deceased has a right of action without regard to whether the deceased left a widow or child or not; and the petition was good without alleging there was such widow or child. East Tenn. Telephone Co. v. Simms' Admr. 404
18. The provisions of that section (241) gave a right of recovery to the personal representative in any event, and only left to the legislature the mere distribution of the recovery. *Idem*... 404
19. The provision of section 160 of the Constitution of Kentucky that the General Assembly "shall prescribe the qualifications of all officers of towns and cities, the manner in and cause for which they may be removed from office," applies to all offices of towns and cities, whether created by the Constitution or the legislature; and the legislature, having fixed by the charter of cities of the first class (Sec. 2781, Ky. Stats.), the manner in which the officers of such cities may be removed, but failing to prescribe the cause for which it may be done, such cause must be such as constitutes misfeasance or malfeasance in office, or

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CONSTITUTIONAL LAW—Continued.

that character of charge which renders the officer unfit for the position; and the members of the boards of public works and public safety, who are appointed for a definite term and at a fixed salary, can not be removed by the mayor or the board of aldermen, except for cause, and after notice and an opportunity to be heard. Todd, Mayor, v. Dunlap, et. al. 449

20. The submission of a question to the voters is an "election" as expressly declared by section 147 of the Constitution of Kentucky; and as section 148 of that instrument provides that "not more than one election in each year shall be held in this State, or in any city, town, district or county thereof, except as otherwise provided in this Constitution," there being no exception in favor of the submission of such questions, they must be submitted at the general election. (Overruling Fidelity Trust & Safety Vault Co., v. City of Morganfield, 96 Ky., 564.) Belknap v. City of Louisville, et. al. 474

21. Under the provision of section 157 of the Constitution that no county, town, etc., shall be authorized to become indebted beyond the current revenue for that year, without the consent of two-thirds of the voters voting at an election to be held for that purpose, the assent of two-thirds of the electors actually voting at the general election when the question is submitted, is necessary to carry it, and not merely two-thirds of those who voted upon that question. And in this case it is obvious that both the statute and the ordinance under which the question was submitted require the favorable vote of two-thirds of those voting at the general election. *Idem* 474

22. The power to remove municipal officers, which is granted the board of aldermen in cities of the first class by section 2781, of the Kentucky Statutes, "sitting as a court, upon charges preferred," is not strictly judicial, and the fact that it is called a court does not make the entire act unconstitutional because violative of the provisions of section 109 of the Constitution: and while the board of aldermen may be termed, while acting in that capacity, in one sense, a court, it is an organized municipal body with power to remove city officials, which the legislature is authorized to create under the provisions of section 160 of the Constitution. Gibbs v. Board of Aldermen of Louisville 490

23. Under the provisions of section 3101 of the Kentucky Statutes, authorizing certain street improvements in cities of the second class, which are to be paid for by the abutting property owners, and wherein the property owner is given the option either to pay in cash or in ten annual payments, and authorizing, in order

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CONSTITUTIONAL LAW—Continued.

to provide for the immediate payment of the cost of improvement where the property owners elect to pay on the ten year plan, the borrowing of money and the issual of bonds therefor, "pledging the faith and credit of the city for the payment of the principal and interest thereof," the bonds to be in ten series, maturing annually through the ten year period, if the issue of the bonds will cause the city to become indebted to an amount exceeding in any year the income and revenue provided for such year, the question as to whether they shall be issued must be submitted to a vote of the people and receive the assent of two-thirds of them at an election to be held for that purpose; and this must be done, although the bond issue is to be "in anticipation of the collection of a special assessment for such improvement. . . . from such property holders." City of Covington v. McKenna 508

24. The provisions of section 2788 of the Kentucky Statutes, in so far as they prescribe how and by what process vacancies in municipal offices may be filled, are in comformity to and meet the requirements of section 160 of the Constitution; but when it comes to providing a time at which an election is to be held by the people to fill the vacancy for the unexpired term of an elective office, the provisions of section 152 of the Constitution must control. Todd, Mayor v. Johnson, County Clerk, et. al..... 548

25. Presidential electors are "State officers," within the meaning of section 152 of the Constitution, which provides that if the unexpired term of an elective officer does not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and three months intervene before such election the office shall be filled by appointment until such election, and then the vacancy filled by an election. *Idem* 548

26. The provision in the charter for cities of the first class (sections 2824 and 2861 of the Kentucky Statutes), that members of the boards of public works and public safety in such cities "shall receive a salary of not less than $2,500," does not fix the salaries of such officers; and there being no salary fixed, an ordinance passed after the appointment and qualification of the members of those boards fixing their salaries at $3,000, was not violative of the provisions of section 161 of the Constitution, prohibiting any change in the compensation of municipal officers during their terms of office. City of Louisville v. Wilson ... 598

27. Members of such boards are "municipal officers," within the mean-

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CONSTITUTIONAL LAW—Continued.

ing of section 161 of the Constitution, and their compensation after being once fixed can not be changed during their terms. *Idem* 598

28. The secretary of the board of public works in a city of the first class, who is required to execute a bond for the faithful discharge of his duties, and who is custodian of the journals of the board's proceedings and other papers and records affecting the public, the assistant bailiff of the police court, who performs the duties of a peace officer and is authorized to serve process and make arrests; and the official stenographer of the police court, whose official acts have the same verity and force as do those of the clerks of the police court, are each and all municipal officers within the meaning of section 161 of the Constitution. To constitute an officer, it is not material whether his term be for a period fixed by law or endures only at the will of the appointing power. If he be invested with some portion of the function of government, to be exercised for the public benefit, he is an officer. *Idem* 598

CONTESTED ELECTIONS—

1. Although the statute regulating election contests requires that the notice shall state the grounds of the contest, and provides that none other shall afterwards be heard as coming from said party, still he is not precluded thereby from amending and making more specific and definite any ground that is embraced in the notice. (Civil Code, sec. 134.) Wilson, et. al., v. Hines, et. al. 221

As to right of contested election board to determine the constitutionality of act under which election held—See Constitutional Law, 11.

As to evidence of voter in, as to how he voted—See Elections, 6.

CONTRACTS—

As to illegal contract between insolvent husband and his wife with reference to his services—See Husband and Wife, 3.

As to contract as inducement to make a lease—See Lease, 1.

As to contract of employment between master and servant—See Master and Servant.

1. It is sufficient execution of a contract by a city that the mayor thereof shall sign his name as such and affix the official seat of the city. Fehler v. Gosnell 380

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CONTRIBUTORY NEGLIGENCE—

As to what constitutes in child—See Railroads, 11.

Conductor not guilty of, because he failed to discover latent defect—See Railroads, 20.

CORPORATIONS—

1. It will be presumed that one who had agreed to take stock in a corporation, and subsequently executed his notes therefor knew when he executed his notes the provisions of the charter or articles of corporation of the company in which his subscription was made, and of which he thus became a member; and he must, therefore, be charged with knowledge that the articles of incorporation authorized the purchase or subscription of stock in other corporations. And this rule applies as well to charters formed under the general law as to those granted directly by the legislature. Oil City Land & Improvement Co. v. Porter 254

2. It is a general rule when one is induced to take stock in a corporation by false representations of an agent thereof, or by the fraudulent concealment of material facts from him, touching the condition of the company, the contract is voidable at the option of the subscriber; but such representations or concealments must be concerning facts not within the knowledge of the subscriber. Where they touch the powers of a corporation under its charter, they are matters of law and will not vitiate the subscription. *Idem* 254

As to competency of admissions of secretary of, as evidence against—See Evidence, 8.

As to taxation of franchises of—See Taxation, 5-8.

As to what constitutes capital stock of—See Taxation, 7.

Not entitled to credit for debts in assessing property for taxation—See Taxation, 8.

CRIMINAL LAW—

As to requirements of indictment under section 1162 Ky. Stats. —See Housebreaking, 1.

As to sale of intoxicating liquors by physicians—See Intoxicating Liquors, 1.

As to right of municipality to pass ordinance fixing penalty at less than common law penalty—See Constitutional Law, 1.

As to exclusive jurisdiction of police courts in cities of fourth class—See Jurisdiction, 2.

As to jurisdiction of police courts in cities of third class—See Jurisdiction, 3.

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CRIMINAL LAW—Continued.

As to penal statute being void for uncertainty—See Railroads, 3.

As to failure to stop train at crossing of two railroad tracks—See Railroads, 4.

As to jurisdiction conferred in special acts with reference to local option—See Constitutional Law, 2, 3, 4.

As to right to take separate vote in town as to sale of liquors therein where the town forms a part of a magisterial district in which special local option law was in force—See Local Option, 1.

As to requirements of indictment under local option law—See Local Option, 2, 3.

As to requirements of indictment under statutes providing protection to fish—See Judicial Notice, 1.

As to when circuit clerk may take bail bond—See Bail Bonds, 1.

As to conviction of defendant of lesser crime than that charged in the indictment—See Assault and Battery, 1, 2, 3.

As to issual of writ of prohibition in criminal cases—See Writ of Prohibition, 1.

As to when municipal ordinance may fix different penalty from that prescribed by statute—See Constitutional Law, 13.

As to authority of municipal boards to pass ordinances—See Ordinances, 2.

As to instruction upon involuntary manslaughter—See Involuntary Manslaughter, 1.

1. The Court of Appeals has no power to reverse a judgment of conviction in a criminal prosecution upon the ground that the evidence is not sufficient to support the verdict, but only "for any error of law appearing on the record, when, upon consideration of the whole case, the court is satisfied the substantial rights of the defendant have been prejudiced." (Crim. Code, sec. 344.) Patterson v. Com. 610

2. By his failure to either demur to the indictment or move to set it aside, in the court below, because it was not properly indorsed, as required by section 119 of the Criminal Code, and because it was not properly presented in court, as required by section 221 thereof, the defendant has waived his right to make those objections in the Court of Appeals. *Idem* 610

3. Where the record shows that the indictment was indorsed by the foreman of the grand jury "a true bill," and it sufficiently appears to have been signed by the foreman, the provisions of the two sections of the Code, above referred to, are substantially

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CRIMINAL LAW —Continued.

complied with; and the statement that the foreman of the grand jury "reported" an indictment, means practically the same thing as if it had said he "presented" it, as required by section 221 of the Criminal Code. *Idem*. 610

4. Where the record states that "the defendant is this day brought into court, . . . and came parties by counsel, and the said defendant having heretofore pleaded not guilty of the offense charged in the indictment, for his trial puts himself upon his country, and the attorney for the Commonwealth likewise," it is a fair, if not necessary inference, and authorized by the record, that the indictment was read and the defendant's plea stated to the jury, as required by section 219 of the Criminal Code. *Idem* 610

5. When a section in the Revised Statutes has been omitted in the General Statutes, or any change made, however slight, in a general law, the whole law as found in the Revised Statutes, on that subject, must be considered and treated as repugnant to the provisions of the General Statutes (Broadus v. Broadus, 10 Bush, 299). And as the witness in this case did not belong to the class excluded by the General Statutes, he was properly permitted to testify. But he was a competent witness independent of that question, as the qualification of an accomplice to testify as a witness in behalf of the Commonwealth is recognized by section 241 of the Criminal Code. *Idem*..... 610

6. The courts are not authorized under the law to require other and additional evidence than the proof of confession to corroborate the testimony of an accomplice, or other than the testimony of an accomplice to accompany proof of a confession. It is wholly for the jury to determine whether the additional evidence does or does not conduce to prove the guilt or furnish the corroboration. *Idem* 610

7. Where the indictment charged the accused with murder, and the jury found "the accused guilty as charged in the indictment, and fixed the punishment at death," although he may have been convicted of manslaughter under the indictment, the verdict sufficiently fixes the degree of the offense, as it is plain what offense the jury intended to find him guilty of and the punishment they intended to inflict. *Idem*..... 610

8. Where a train is chartered from a railroad company to be run as a special train by those who chartered it, and the company furnished them the cars for both white and colored persons, as required by section 795 of the Kentucky Statutes, the company was guilty of no offense because the manager of the

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CRIMINAL LAW—Continued.

train required colored persons to occupy a car thereon which did not have the same conveniences and accommodations as the other cars of the train occupied by white persons.

If any offense was committed, it was the failure of the conductor or manager of the train to assign the parties to the proper coaches as required by section 799. L. & N. R. R. Co. v. Com. 663

CROSS-EXAMINATION—

As to, of witness with reference to his past life, history and habits—See Evidence, 6.

COUNTY ATTORNEY—

1. Fines and costs against defendants in criminal cases which are not paid or replevied, but which are worked out at hard labor for the benefit of the county, are not "collected" within the meaning of the statute; and, consequently, the county attorney who prosecutes in those cases is not entitled to his per centum of such fines. Power v. Fleming Co. 200

COUNTY CLERKS—

As to limitation applicable to sureties on bonds of—See Bonds of Public Officers, 4.

COUNTY COURTS—

As to power of, to declare office of sheriff vacant for failure to renew bonds—See Constitutional Law, 7.

As to power of County Court to accept renewal bond of sheriff, subsequent to time it was required by law to be executed—See Bonds of Public Officers, 1.

1. It was the purpose and intent of the act relating to courts of justice, approved June 10, 1893, to make the terms of county courts throughout the State uniform, so far as to require that they shall be monthly; and that act had the effect to repeal an act of February 25, 1854, to establish a county court for Jefferson county, in which it was provided that a county court for that county should be held "on the first Monday in every second month;" and it also had the effect to fix the first Monday in the month as the beginning of each regular monthly term of the Jefferson County Court, as that day was fixed as the begin-

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COUNTY COURTS—Continued.

ning of the bi-monthly terms in the act of February 25, 1854 Richie, County Judge v. Peiper's Ex'x. 194

2. The Jefferson County Court has the authority, under the statute, to consider and act upon any matter within its jurisdiction and properly before the court, upon any juridical day of any monthly term of the court; and the court may be kept open for the transaction of any such business by adjourning from day to day during the term and up to the final adjournment for the term, subject only to the exceptions contained in the statute relating to the business of special terms of the court. *Idem.* 194

As to exclusive jurisdiction of, to grant saloon licenses—See Bonds of Public Officers, 3.

3. Under the provision of the General Statutes, chapter 28, article 17, section 6, with reference to county courts, that "before every adjournment the minutes of the proceedings of the court shall be publicly read by the clerk, and corrected, if necessary and then the same shall be signed by the judge as presiding justice," and the provision of the succeeding section that "no minute or order shall be valid until the same be read and signed;" it is not necessary that each day's proceedings shall be read and signed on that particular day; but the court may treat the entire time it is in session as one day and make and sign but one adjourning order. (Dye v. Knox, 1 Bibb, 575; 11 Bush, 238.) Com. for use Clay Co. v. Howard, etc. 542

COUNTY JUDGE—

As to when he shall order election to vote an annual tax for school purposes—See Elections, 1.

As to duty, in ordering election under local option law—See Local Option, 6.

DAMAGES—

1. Where there was no personal injury to a passenger in being ejected from a train, and the delay caused by his ejection resulted in no pecuniary loss to him, a verdict of $500 damages is excessive. L. & N. R. R. Co. v. Breckinridge 1

As to vendor's lien for damages to real estate—See Vendor and Vendee, 2.

As to right of depositor to action for, against bank for refusal to pay check—See Banks and Bankers, 1.

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DAMAGES—Continued.

As to, upon dissolution of injunction—See Injunction Bond, 1.

As to when damages may be set up in a counter-claim—See Vendor and Vendee, 5.

2. The damages for the wrongful delivery to the consignee of goods, in violation of the shipper's orders, can not exceed the value of the goods. L. & N. R. R. Co. v. Hartwell 436

3. In an action for the recovery of personal property wrongfully taken under an attachment, and damages for the taking and detention thereof, it appearing that the property was mortgaged, the plaintiff was only entitled to recover damages for the detention up to date of a judgment of foreclosure, at which time his right of possession ceased, and not up to the time of the trial of his action for damages. Gaar, Scott & Co. v. Lyon, &c.. 672

DEEDS—

As to limitation where there is no consideration for the execution of—See Limitation, 1.

1. The expression "to the right heirs of said Henry and Harriet," means those to whom the property would pass by the law of descent. Brent v. Long, et. al. 245

DEFEASIBLE FEE—See Wills, 1.

DEFECT OF PARTIES—See Parties to Actions, 1.

As to right to complain of, in Court of Appeals for first time—See Parties to Actions, 1.

DEMURRER—

As to when overruling of, is not prejudicial—See Practice in Civil Cases, 8.

DEPOSITOR—

As to action by, for damages for refusal of bank to pay check—See Banks and Bankers, 1.

DESCENT AND DISTRIBUTION—

1. Under the provision of the Kentucky Statute that "the issue of an illegal or void marriage shall, nevertheless, be legitimate," although the marriage was consummated in a State under the laws of which the marriage was void and the issue therefrom illegitimate, the issue of such a marriage may inherit property in Kentucky from their parents and collateral kindred. Leonard, et. al., v. Braswell, et. al..... 528

2. A subsequent section of the statute relative to void marriages which provides that "where the marriage is contracted in good faith, and with the belief of the parties that a former husband or wife

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DESCENT AND DISTRIBUTION—Continued.

then living was dead, the issue of the marriage born or begotten before notice of the mistake shall be legitimate issue of both parties," does not qualify the previous provision that the issue of an illegal or void marriage shall be legitimate. *Idem* 528

DEVISES—

As to construction of—See Wills.

As to disposition of rents accruing on leased land prior and subsequent to the death of the testator—See Rents, 1.

DISABILITY OF VOTER—See Elections, 4.

EARNINGS OF INSOLVENT HUSBAND—

As to when they may be subjected to the payment of his debts—See Husband and Wife, 2, 3.

EJECTION FROM TRAIN—

As to ejection from train for nonpayment of fare—See Railroads, 1.

As to, when agent by mistake sold passenger wrong ticket—See Railroads, 13.

EJECTMENT—

1. Under the provisions of section 125 of the Civil Code, subsection 2, in an action to recover land the answer of the defendant "must state whether or not he claims it, or any part of it," and without such allegation, if a defendant claims the land he is sued for, he can not be allowed to avail himself, in defending the action, of any advantage derived from any claim he may have to the same. Brent v. Long, et al. 245

ELECTIONS—

1. The petition provided for by section 4464 of the Kentucky Statutes to be directed to the county judge preliminary to the calling of an election taking the sense of the voters of a proposed graded school district upon the proposition whether or not they will vote an annual tax for school purposes, should be filed with the county judge in term time, and the election therein provided for should not be ordered till the next regular term of the county court. Webb, &c. v. Smith, &c. 11

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ELECTIONS—Continued.

2. Section 1528 of the Kentucky Statutes, in so far as it applies to the issuing by a circuit judge of a writ of proclamation for an election to fill a vacancy in the office of circuit clerk, is only directory, and it is not essential to the validity of such an election that such a writ should be issued. Sterritt v. McAdams 37
3. In case of such vacancy the Constitution, in express terms, fixes the time for holding the election, and it will be presumed that the voters knew of the death of the incumbent, and that an election must follow. But in cases where the time and place for holding the election must be designated by the one authorized to call it, the rule would be different. *Idem.* 37

As to right of town trustees to hold over when no election held to name their successors—See Constitutional Law, 6.

As to, under local option law—See Local Option, 1, 3, 4, 5.

As to jurisdiction of contest board to determine constitutionality of act under which election was held—See Constitutional Law, 11.

As to duty of county judge in ordering local option election—See Local Option, 6.

4. The provision of section 1475 of the Kentucky Statutes requiring that a voter shall declare his disability on oath before his ballot can be marked for him by the clerk of the election, is mandatory to the voter, and a ballot so marked without the declaration on oath being made is an illegal vote, and should be excluded. Major v. Barker. 305
5. Ballots marked in the voting-booths either by the clerk of election or in his presence, were ballots "shown to another" within the meaning of section 1474 of the Kentucky Statutes, and should not have been deposited in the box, and if so deposited were illegal votes. *Idem.* 305
6. The evidence of a voter as to how he voted at an election is incompetent as well in a contested election case where relief is sought from fraud, as upon the trial of an indictment of an election officer for making a false return. (Commonwealth v. Barry.) *Idem.* 305

Submission of a question to voters must be at general election—See Constitutional Law, 20.

As to what vote carries a proposition to become indebted

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ELECTIONS—Continued.

beyond the current revenue for that year under provisions of section 157 of the Constitution—See Constitutional Law, 21.

As to how and when vacancy in elective office to be filled by election—See Constitutional Law, 24, 25.

EMERGENCY CLAUSE—

As to impeachment of, by journals of two Houses of Legislature—See Constitutional Law, 10.

ENROLLED BILL.

As to the impeachment of, by journals of the two Houses of the Legislature—See Constitutional Law, 5, 8, 10, 12.

EVICTION—

As to when not necessary to create "existing liability."—See Existing Liability, 2.

EVIDENCE—

1. Upon the trial of an action for criminal assault, there being no witnesses except the plaintiff and defendant, an instruction in explaining the burden of proof "that this does not necessarily mean the plaintiff must have two witnesses to the wrongful act, but that the case in all its facts and circumstances given in evidence, must preponderate, in their judgment, in favor of the plaintiff" was erroneous. In such a case the jury should be left to determine from the evidence, taken in connection with the facts and circumstances detailed by each, which of the two is to be believed. Ragsdale v. Ezell, &c. 236
2. The word "preponderance" should not be used in such instructions, as it is only calculated to embarass the jury when considering the issue. *Idem* 236
3. Where the defendant shortly after the alleged assault had gone by the plaintiff's house and told her to tell her husband that C could let him have tobacco plants it was error to permit a witness to state by way of showing that defendant must have gone there for some other purpose, that a tenant on C's farm had told him that C was at that time short of tobacco plants. *Idem* 236

As to evidence of voter as to how he voted—See Elections, 6.

4. On the trial of an indictment for homicide, evidence introduced by the Commonwealth that the deceased left a wife and four children and that the wife had been sick ever since her husband's death was not material and did not operate to the prejudice of

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EVIDENCE—Continued.

defendant's substantial rights; nor did the customary speech of the prosecutor in such cases with regard to the reputation of the State for crimes of violence and the disgrace a failure to convict would, as he claimed, bring upon the country, have the effect to inflame the minds of the jury, it appearing that the penalty imposed was the lowest permitted for voluntary manslaughter. Warren v. Com. 370

5. When a defendant puts himself on the stand as a witness, he thereby submits himself to such cross-examination as any other witness may be subjected to. (Burdette v. Commonwealth, 93 Ky., 77.) *Idem* 370

6. While counsel should not be given unrestricted liberty in cross-examination of a witness with reference to his past life, history and habits, yet he may be asked such questions as tend to shake his credit by injuring his character, and he may be cross-examined as to specific facts, tending to disgrace or degrade him, although such facts are irrelevant and collateral to the main issue; but the extent to which such cross-examination may be carried is within the discretion of the court. *Idem*. 370

7. Evidence introduced by the defense that a prosecuting witness was a "tough negro," would undoubtedly be understood by jurors generally as putting in issue his general moral character, and would give the prosecution the right to introduce evidence to sustain the same. *Idem* 370

8. A letter from a secretary of a corporation, written after the transaction occurred, which is the subject of the suit, and making damaging admissions against the company, was not competent evidence; and even if otherwise competent, it contained a mere opinion based on hearsay, as the writer had no personal knowledge of the facts. East Tenn. Tel. Co. v. Simm's Adm'r.... 404

As to evidence on trial of action for libel—See Libel, 1, 2.

9. In an action on a policy of marine insurance, the testimony of one of the plaintiffs as to what the general agent of the company had said to him about certain information he had from another agent of the company, who had been sent to the scene of the wreck with a view to recovering the cargo was competent. Louisville Ins. Co. v. Monarch, et. al. 578

10. The written evidence of witnesses taken before the hull inspectors upon an investigation of the facts attending the disaster is not evidence against the insured, they being no parties to the investigation. *Idem* 578

11. Where the company was trying to show that the boat was unseaworthy because of the defective condition of the hull, the evi-

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EVIDENCE—Continued.

dence of the captain of the boat, whose experience gave him a knowledge of such matters, that the boat might strike an obstruction and the contact not be felt or noticed by those on board, was competent. *Idem* 578

12. It being charged in the answer that the boat was sunk because of the willful and fraudulent misconduct of the owners and officers of the boat, evidence of the value of the boat and that she was not insured was competent to show lack of motive to destroy it. *Idem* 578

13. It is within the discretion of the trial court to determine whether, after a party to the action has testified in chief and then introduced other testimony in chief, he may be recalled and give other testimony which he might have given in chief. *Idem* 578

As to competency of one convicted of crime to testify—See Criminal Law, 5.

EXCESSIVE DAMAGES—

As to excessive damages for ejection from train—See Damages, 1.

EXCLUSIVE JURISDICTION—

As to exclusive jurisdiction of police courts in cities of fourth class—See Jurisdiction, 2.

As to exclusive jurisdiction of county courts to grant saloon licenses—See Bonds of Public Officers, 3.

EXECUTION—

As to collection of allowance for alimony by—See Alimony, 1.

EXEMPT PERSONAL PROPERTY—

As to levy of attachment on, by mortgagor—See Attachments, 2.

EXISTING LIABILITY—

1. Where one assumes the debt of another, in consideration of the conveyance to him of real estate, the contract being in writing, it is an existing liability against him, and the fifteen-year statute of limitation is applicable thereto.

And an assignment of that claim by the creditor to the party assuming it, which was without consideration and disregarded by the parties themselves, will not be treated as effectual for any purpose. Bement v. Ohio Valley B. & T. Co. 109

2. A covenant in a deed by a grantor by which he warrants title and possession to the property conveyed, is an "existing liability" within the meaning of the statute from the time of the execution of the deed; and it is not necessary to await eviction before it becomes such. *Idem.* 109

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EXTERNAL, VIOLENT AND ACCIDENTAL MEANS—

As to what constitutes, in accident insurance—See Accident Insurance, 1, 2.

EXTORTION—

As to when statute against void for uncertainty—See Railroads, 3.

FALSE REPRESENTATIONS—

As to, about matters of law—See Corporations, 1, 2.

FARMING LANDS—

As to when may be taxed for municipal purposes—See Taxation, 1, 4.

FELLOW-SERVANTS—

See Railroads, 18.

FINAL JUDGMENT—

As to what constitutes, of an election contest board—See Constitutional Law, 11.

FINES—

As to what fines are "collected" within meaning of statute—See County Attorney, 1.

FISCAL COURT—

1. Under article 6, chapter 52, of Kentucky Statutes, which provides for the appropriation by the fiscal court of a county of surplus funds for the construction of turnpikes upon application by citizens of a magisterial district, upon certain conditions, which have been complied with by the said citizens, the fiscal court has no arbitrary power in the premises; but it has a discretionary power in making such appropriations, and has the power to see that the fund is properly distributed and properly applied. Highbaugh, &c. v. Hardin Co. Ct. 16
2. In this case the fiscal court properly refused to make the order for the construction of the turnpike, because it is manifest that it would, when finished, only benefit a few of the residents of the district, and a large majority of the voters and taxpayers in the district desired its proportions of the surplus fund appropriated to the improvement of such roads therein as would benefit the greatest number. *Idem.* 16

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FISCAL COURT—Continued.

3. The fiscal court of a county is in effect a legislative board, invested with the power by law of making appropriations in cases where the needs of the county require it, and it is beyond the power of a judicial tribunal to interfere and determine what improvements should be made, and the extent of the expenditures necessary, even though that board may neglect its duties, fail to improve the roads or make appropriations for that purpose. *Idem.* 16

4. The fiscal court of a county has the power to carry out the provisions of a special act passed prior to the adoption of our present Constitution, which act granted the then existing court of levy and claims certain powers with reference to carrying into effect its provisions. Pierce v. Mason Co., et al. 357

FLAGMAN—

As to when railroad company required to have one at crossing—See Railroads, 16.

FRANCHISES—

As to taxation of—See Taxation, 5, 8.

FRAUD—

As to fraudulent representations about matters of law—See Corporations, 1, 2.

FRAUDULENT CONVEYANCE—

As to purchase of property with insolvent husband's means and having same conveyed to his wife—See Husband and Wife, 1.

As to how action to set aside, must be commenced against a non-resident—See Commencement of Action, 1, 2.

GAMING—See Jurisdiction, 1.

As to authority of municipal boards to pass ordinances concerning—See Ordinances, 2.

GENERAL ACT—

As to when will effect repeal of local act—See Local Act, 1.

As to when it will not have effect to repeal local act—See Constitutional Law, 14, 15.

GENERAL MORAL CHARACTER—

As to what puts it in issue—See Evidence, 7.

As to when plaintiffs', is in issue in action for libel—See Libel, 1, 2.

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GROSS NEGLIGENCE—

As to when allegation of willful negligence is synonymous with—See Pleadings, 7.

When not necessary to show, in order to recover—See Railroads, 19.

GUARDIAN AND WARD—

1. Without statutory restraint, a guardian may compromise, settle and release claims and demands due to, or made by or on behalf of his ward, and the ward will be bound thereby, unless it is done in bad faith, or in fraud of his rights. Manion, by &c. v. O. V. Ry. Co. 504
2. The provision of section 2030 of the Kentucky Statutes that a guardian "with leave of court, may compound a debt or demand" of his ward, means only such debts or demands as may be due or owing to the ward, and not such as are of the nature of unliquidated damages for tort to the person or property of the ward, and a settlement by the guardian without leave of court of such a claim for unliquidated damages is binding on the ward, if made in good faith. *Idem.* 504

HOMESTEAD—

1. The general doctrine is that before one has a right to a homestead in land, he must have actually lived on it; but where the husband and wife own adjoining tracts of land, and it is all used and cultivated as one farm, the husband will be entitled to a homestead out of the part of the land owned by him, although the house which they occupied was actually on that part of the farm owned by the wife. (Distinguishing Vanmeter v. Vanmeter, 12 Ky. Law Rep., 214.) Mason v. Columbia F. & T. Co. 117

HOUSEBREAKING—

1. An indictment under section 1162 of the Kentucky Statutes, which charges the defendant simply with breaking and entering a dwelling-house with intent to steal, without alleging that there was anything stolen and taken therefrom, does not charge a felony within the meaning of that section. It is an essential part of the crime designated in that section, that something of value should be taken away from the house. Arthur v. Com. 35

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HUSBAND AND WIFE—

1. Where an insolvent husband pays out of his own means part of the purchase price on real estate, which is conveyed to his wife, his interest therein may be subjected to the payment of his antecedent debts. The evidence in this case shows that the husband had at least an interest worth $3,000 in the property sought to be subjected. Brooks-Waterfield Co. v. Frisbie, et al. 125
2. Where the increase in value of the wife's property and the accumulation of her property and means is chiefly due to the labor and skill and energy of the insolvent husband, a part of such increase and accumulation may be treated as his earnings, and subjected to the payment of his debts. *Idem*. 125
3. Such earnings can not be legally given to the wife by him, so as to defeat the claims of his creditors; and the fact that the husband engaged to render services to the wife at an inadequate price can not change this principle. *Idem*. 125

INDEMNITY—

As to when purchaser may hold goods which do not satisfy the contract, as indemnity for damages on former shipment which was paid for in advance—See Vendor and Vendee, 6.

INDICTMENT—

As to requirements of indictment under section 1162, Kentucky Statutes—See Housebreaking, 1.

As to requirements of under local option law—See Local Option, 2, 3.

As to requirements of indictment under the laws providing protection to fish—See Judicial Notice, 1.

As to conviction of defendant under, for lesser crime than that charged therein—See Assault and Battery, 1, 2, 3.

INFANTS—

As to sale of infant's real estate—See Sales of Infant's Real Estate, 1.

INJUNCTION BOND—

As to jurisdiction of State courts of action on, when it was executed in the Federal courts—See Jurisdiction, 5.

1. It is only where the enforcement of a judgment has been enjoined that the court must at the time the injunction is dissolved ascertain the damages. (Alexander v. Gish, 88 Ky., 13.) Eastern Ky. Ry. Co. v. Brown 540

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INSTRUCTIONS—

As to, upon burden of proof—See Evidence, 1, 2.

As to, upon involuntary manslaughter—See Involuntary Manslaughter, 1.

1. A refusal by the court to give an instruction which contained a correct statement of the law, is not prejudicial, when the same matter was substantially, and in such manner as to be clearly understood, embodied in other instructions, which were given. Patterson v. Com. 610

INTENDMENT AFTER VERDICT—See Pleadings, 6.

INTENTION—

Intention of parties controls in determining whether the law of the place where executed or the law of the place where it is to be performed controls a contract—See Lex Loci Contractus, 1.

INTEREST—

1. Although the legacy became due upon the renunciation of the will by the widow, there being a contest over the will the legacy could not be safely paid till it was decided, and interest should only be computed from that time. Trustees Church Home v. Morris 317
2. A note payable in two years after date "with interest at the rate of six per cent. per annum, from ———— until paid," bears interest from date, and not merely from date of maturity. Miller v. Cavanaugh 377

INTERSTATE COMMERCE—See Taxation, 6.

INTOXICATING LIQUORS—

1. Upon the trial of an indictment for selling liquor without license, it was error to refuse to permit the defendant to show that he was a druggist and the family physician of the person to whom the liquor was sold, and in good faith sold the liquor as an ingredient of a prescription put up by him as a medicine, at the request of such person. Lindsay v. Com..... 164

INVOLUNTARY MANSLAUGHTER—

1. An instruction as to involuntary manslaughter was properly refused in this case where the deceased was accidentally killed while the defendant was either defending himself against another or attempting to kill such other. The distinction between such a case, and one in which there is an unintentional discharge of a pistol lies in the intent. Warren v. Com..... 370

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JAILERS—

1. The services required of jailers by sections 356 and 1730 of the Kentucky Statutes are official services; and the fees allowed the jailer under those sections for attendance upon circuit, county and quarterly courts and furnishing fuel, lights and water for same, must be included in the statement required of the jailer of counties of 75,000 population or over, by the provisions of section 1773 of the Kentucky Statutes, to be made monthly to the Auditor of Public Accounts and showing the amount received by him as fees or compensation; and the Commonwealth is entitled under the provisions of section 1774 to retain 25 per cent. of the fees and compensation so paid into the treasury by the jailer. Stone, Auditor, v. Pflanz, et. al..... 647
2. The jailer is not authorized under the provisions of sections 356 and 1730 of the Kentucky Statutes, or any other statute, to furnish fuel, lights, water, etc., to county or other officers. *Idem* 647

JOINT DEVISES—

As to effect of death of one of joint devisees—See Wills, 3.

JUDGMENTS—

As to what things a judgment is conclusive of—See Res Adjudicata, 1.

1. Where one takes charge of the defense to an action, controls it, employs counsel, produces evidence, and pays the expenses of the nominal defendant to the suit, he is bound by the judgment in the action, although the record does not show him to be a party thereto. Schmidt v. L. C. & L. Ry. Co..... 143
2. In such case the proper method of enforcing the judgment against such an one who is not a party of record to the suit, would be to institute a separate suit setting up these facts, or by rule in the original suit, based upon an affidavit containing the facts. *Idem* 143
3. A suit on apportionment warrants for street improvements, seeking a sale of the property is a proceeding *in rem.* against the property, and a judgment therein may be appealed from, although it be for less than one hundred dollars, no personal judgment having been sought or recovered. Fehler v. Gosnell..... 380

As to power of court to render judgment on a general verdict which fixes no amount of recovery—See Practice in Civil Cases, 9.

JUDICIAL NOTICE—

1. The courts will take judicial notice of the fact that a county is an interior county, and consequently have no stream within its limits "forming the boundary line between this and other States." Com. v. Drain, et., al. 162

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JUDICIAL SALES—

As to, of road bed of a railroad to satisfy vendor's lien on land over which the road was constructed—See Vendor and Vendee, 4.

JURISDICTION—

1. Circuit courts have jurisdiction to try an indictment under the statute against unlawfully engaging in a game of chance, even though the offense may have been committed within a city the ordinances of which provide the same punishment therefor as is fixed in the statute. Com. v. Wickersham..... 21
2. The "exclusive jurisdiction" conferred upon police courts in cities of the fourth class by section 3513 of the Kentucky Statutes embraces only such offenses as have their origin and existence in virtue of ordinances applicable to the municipality, and independent of any statute of the State. *Idem*..... 21
3. Police courts in cities of the third class are given "exclusive jurisdiction of all prosecutions for violations of ordinances or by-laws of the city, occurring within the corporate limits of the city." City of Owensboro v. Simms..... 49

As to jurisdiction of justices of the peace—See Constitutional Law, 3.

As to jurisdiction of contested election board to determine constitutionality of act under which election was held—See Constitutional Law, 11.

As to exclusive jurisdiction of county court to grant saloon licenses—See Bonds of Public Officers, 3.

As to jurisdiction in action for rescission of sale of land—See Rescission, 2.

4. Section 2781 of Ky. Stat. provides that executive and ministerial officers in cities of the first class, unless otherwise provided, shall be removable by the board of aldermen sitting as a court, on charges preferred; and the jurisdiction therein conferred to try such officers is not taken from it as to park commissioners, by the provisions of section 2847, that if any member of the board of park commissioners commits a felony he shall immediately cease to be a member of the board. Gibbs v. Board of Aldermen of Louisville 430
5. Although an injunction bond is executed in the Federal courts. upon the dissolution of the injunction, the State courts have jurisdiction of an action on the bond. (Meyers v. Block, 120 U. S., 206.) Eastern Ky. Ry. Co. v. Brown 540

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KENTUCKY STATUTES—

Provisions cited, construed, etc.

Section 107 683
Section 356 650
Section 453 385
Section 473 268
Section 795 664
Section 796 664
Section 797 664
Section 799 666
Section 800 666
Section 806 65
Section 816 136
Section 819 136
Section 950 384
Section 966 22
Section 1058 197
Section 1078 95
Section 1093 ..... 22, 70, 354
Section 1162 36
Section 1163 36
Section 1164 36
Section 1166 183
Section 1242 183
Section 1443 95
Section 1474 309
Section 1475 308
Section 1514 553
Section 1528 40
Section 1535 226
Section 1543 553
Section 1545 553
Section 1730 650
Section 1772 649
Section 1773 649
Section 1774 649
Section 1775 651
Section 1840 366
Section 1886 17
Section 1887 17
Section 1888 17
Section 1889 17

Digitized by Google

KENTUCKY STATUTES—Continued.

Section 1899 163
Section 1977 .....21, 354
Section 2030 506
Section 2123 33
Section 2514 301
Section 2515 300
Section 2519 300
Section 2551 300
Section 2552 300
Section 2713 393
Section 2740 397
Section 2753 602
Section 2781 .....456, 493
Section 2788 551
Section 2794 456
Section 2803 605
Section 2817 395
Section 2824 603
Section 2826 78
Section 2829 386
Section 2833 .....215, 390
Section 2834 .....215, 384
Section 2847 493
Section 2854 476
Section 2861 603
Section 2949 215
Section 3073 512
Section 3096 510
Section 3101 510
Section 3290 .....51, 356
Section 3294 356
Section 3359 .....52, 354
Section 3360 355
Section 3364 356
Section 3449 424
Section 3450 424
Section 3513 23
Section 3629 270
Section 3637 295

Digitized by Google

KENTUCKY STATUTES—Continued.

Section 3646 295
Section 3672 96
Section 3704 94
Section 4020 639
Section 4077 639
Section 4078 640
Section 4079 634
Section 4080 634
Section 4129 100
Section 4130 101
Section 4131 101
Section 4133 106
Section 4134 101
Section 4203 .....166, 298
Section 4205 166
Section 4337 215
Section 4437 215
Section 4464 .....12, 229
Section 4557 106

LATENT DEFECT—

Conductor not required to know of, in appliances on cars—See Railroads, 20.

LEASE—

1. Where one of several lessors who had agreed to buy groceries to a certain amount from the lessee as an inducement to his leasing the property, failed to comply with agreement, it is not a good ground for the cancellation of the lease. Hill v. Rudd. 178
2. Where a lease provides that the premises are not to be sublet without the written consent of the lessors, it is no defense to an action on the lease for rent, that they refused to agree in writing that the premises might be sublet. *Idem.* 178
3. Where it is provided in a lease that the premises are not to be sublet without the written consent of the lessors, the fact that they will not give such consent is not ground for the cancellation of the lease. *Idem.* 178

LEGACY—

As to when interest on, begins—See Interest, 1.

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LEGISLATIVE POWER—

As to delegation of, to city engineer, in ordinance directing street improvement—See Street Improvements, 10.

LESSER CRIME—

As to conviction of defendant of lesser crime than that charged in the indictment—See Assault and Battery, 1, 2, 3.

LESSOR AND LESSEE—

See Lease.

LEX LOCI CONTRACTUS—

1. Where a note is made payable at a bank in New York, but was executed by one obligor in Washington, D. C., and the other in Kentucky, and mailed to the payee in New York, and afterwards assigned to Ohio parties, the law of Kentucky controls and not the law of New York. The intention of the parties must control in determining what law is to govern their rights under the contract, whether the law of the place where the contract was entered into or the law of the place where it was to be performed. Wm. Glenny Glass Co. v. Taylor, &c. 24

LIBEL—

1. When a defendant, in an action for libel, pleads that the libelous matter complained of by the plaintiff is true, the character of the plaintiff is in issue, and evidence concerning his general character is admissible. Ratcliffe v. Courier-Journal Co. .. 416
2. Where the libelous charge was that "he had been in more rows than any other one man in this county," and the answer pleaded the truth of the charge, it was proper to bring out in evidence before the jury, instances of quarrels and disturbances in which the plaintiff had been engaged in that county; and how far such specific acts went towards establishing the truth of the charge was a question for the jury. *Idem.* 416

LIEN—

As to when vendor is entitled to for damages—See Vendor and Vendee, 2.

As to when bank has, on deposit for a debt owing it by the depositor—See Banks and Bankers, 1, 2.

As to lien of vendee upon rescission of land sale for money paid—See Rescission, 1.

As to vendor's lien upon land over which a railroad was constructed subsequent to the sale—See Vendor and Vendee, 3, 4.

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LIFE TENANT—

1. A life-tenant can not lay out money in building on the land and charge it on the estate in remainder, or make it a personal charge against the remainder-men. Nor does it seem to make any difference that he made the improvements upon the false assumption that he had absolute title to the property. Henry, &c. v. Brown, &c. 13

LIMITATION—

As to, where one assumes debt of another in consideration of the conveyance to him of real estate—See Existing Liability, 1.

1. The plea of limitation can not avail in upholding a release from the payment of the recited consideration in a deed, the release being without consideration, and having been executed within ten years before the commencement of the action; and especially where the release was not, and could not with reasonable diligence have been discovered before it was filed in court. Bement v. O. V. Banking & Trust Co. 109

As to, on bonds of public officers—See Bonds of Public Officers, 4.

LOCAL ACT—

1. The provisions of a local act incorporating a town and the amendments thereto, which were passed under the former Constitution of Kentucky, which did not prohibit local legislation, giving to a school board a certain per cent. of revenue derived from taxation of the liquor traffic, stand repealed by the charter for cities of the class to which that town belongs, wherein it is provided that all money so derived shall go into the general fund. City of Hawesville v. Board of Education of Hawesville. 292

As to when local act will not be repealed by general law—See Constitutional Law, 14, 15.

LOCAL OPTION—

As to special acts with reference to and jurisdiction therein conferred—See Constitutional Law, 2, 3, 4.

1. It is plain both from the general local option law and the act for the government of towns of the sixth class, that a separate vote on the question whether liquor shall be sold in the town may be had in the town, although it may have formed a part of a magisterial precinct in which a special prohibitory law was

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LOCAL OPTION—Continued.

in force at the time the present local option law went into effect. It is not necessary that the vote be taken in the whole magisterial precinct. (Distinguished from King v. Com., 86 Ky., 436.) Lafferty, &c. v. Huffman, &c. 80

2. Where a local option law by its terms is to go into effect in a particular territory only by a vote of the people thereof at an election therein, to be held only after certain conditions have been complied with, an indictment for a violation of such law to be good on demurrer, must allege facts which show that the act has been put in force as required by its terms. (Overruling Young v. Commonwealth, 14 Bush, 161.) Com. v. Shelton.. 120

3. An indictment under the local option law which charges that the county judge ordered an election upon the written petition "by a number of legal voters equal to 25 per cent. of the votes cast in each of the precincts in said Stanford magisterial district at the last preceding general election" is defective, because the county judge was only authorized to order the election on the application "by written petition signed by a number of legal voters in each precinct of the territory to be affected" equal to 25 per cent., etc. *Idem* 129

4. Under the provisions of the act of August 6, 1892, known as the "Local Option Law," it was proper to submit to the voters of a town the question whether liquors should be sold therein, notwithstanding the town was a part of a magisterial district in which local option was then in force under a vote authorized by a local act. Com. v. Hardin Co. Court 188

5. And the fact that there was submitted at the same time a proposition as to whether the local option law then in force in the magisterial district should become inoperative in so far as it applied to the town which was a part of the magisterial district, does not invalidate the election on the other proposition, although the submission thereof was unauthorized. *Idem* 183

As to the manner of passage of the local option law—See Constitutional Law, 5, 8, 10, 12.

6. Under the provisions of the act of August 6, 1892, requiring the county judge, at the "next regular term" of the county court, after receiving the petition for an election, to make an order therefor on some day not earlier than sixty days after said application is lodged, it is necessary that the petition should be received in court and a record made of it. And an election held where the petition was received by the county judge out of court on one day, and the election ordered the next day, which was the first day of the term, is void. Wilson, et. al., v. Hines, et. al. 221

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MANDAMUS—

As to the right to mandamus the fiscal court—See Fiscal Court, 3.

MARINE INSURANCE—

As to evidence on trial of action on policy of—See Evidence, 9, 13.

1. The company can not defeat a recovery on a policy of marine insurance, because the number of the crew was not as large as that designated in the license, it appearing by the evidence that the boat had a sufficient number of officers and men to make the trip; and, especially where there was no evidence even tending to show that the sinking of the boat resulted from an insufficient crew. Louisville Ins. Co. v. Monarch, et. al.,.... 578
2. The mere negligence of the owners of a boat or the officers in charge of it is no defense by an insurance company to a marine policy on the cargo. The only misconduct of the masters and officers which would defeat a recovery on the policy is fraud or design; although the policy insures against the unavoidable dangers of the river, that provision relates to the peril embraced by the policy and not to the skill or care to be exercised by those in charge of the boat. *Idem*..... 578
3. It appearing that the insurance company had made preparations to recover the property, but was prevented by a rise in the river, which lasted two months, at which time it decided not to attempt the recovery and notified the insured that it denied liability on the policy, the cargo being of a character to be destroyed by the action of the water upon it, the insured was justified in abandoning the submerged cargo; and was not liable for any part of the expense incurred by the company in its preparations to recover it. *Idem* 578
4. In an action on a marine insurance policy for a total loss, where the answer denies there was a total loss, and it appears from the evidence that part of the insured cargo was recovered by the owners, the company is entitled to a reduction of the amount of the insurance in proportion to the value of the property recovered, less the expense incurred by the owners in its recovery. *Idem* 578

MARRIAGES—

As to right of issue of void or illegal marriages to inherit in this State—See Descent and Distribution, 1, 2.

MASTER AND SERVANT—

1. A contract of employment between master and servant, in which there is no specified term in days and months, is one which

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MASTER AND SERVANT—Continued.

may be terminated at will by either of the parties thereto. L. & N. R. R. Co. v. Harvey 157

2. Where a brakeman was employed by a railroad company during a strike, and there was no specified term of employment, the company was not compelled to retain him in its service longer than the one month, if that long; and no formal discharge by the company was necessary. *Idem* 157

3. A contract by a railroad company to give one employment as a freight conductor so long as he does "faithful and honest work," is indefinite as to the time of service, and terminable at any time by either party. L. & N. R. R. Co. v. Offutt..... 427

4. In such contracts, when the term of service is left discretionary with either party, or when it is not definite as to time, or when it was for a definite time, provided both parties are satisfied—in either event either party has the right to terminate it at any time, and no cause therefor need be alleged or proved. *Idem* 427

5. A contract of employment which does not bind the employe to serve the employer either a definite or an indefinite time, may be terminated at any time by the employer, although he may have agreed to give the employe work as long as he did honest and faithful service—the essential element of mutuality of obligation being absent in such a contract. *Idem* 427

6. An agreement by an employer to give the employe regular work so long as he does faithful and honest service is legal, and not against public policy; and such a parol agreement is not within the statute of frauds. *Idem*..... 427

MAYOR—

As to his right to remove municipal officers—See Constitutional Law, 19; and Office and Officer, 1.

As to when and how vacancy in office of, to be filled—See Constitutional Law, 24, 25.

MEASURE OF DAMAGES—

As to, for wrongful delivery of goods to consignee by carrier. —See Damages, 2.

As to, in action by passenger who was refused a ticket and compelled by conductor to pay extra fare—See Railroads, 17.

As to measure of damages in action to recover for wrongful taking and detention of personal property—See Damages, 3.

MORTGAGED PERSONAL PROPERTY—

As to attachment of, by mortgagor—See Attachments, 1, 2.

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MORTGAGES—

As to attachments by mortgagor of mortgaged personal property—See Attachments, 1, 2.

1. A mortgage by a merchant on his stock of goods and credits, which provides that the mortgagee may, under certain circumstances, have possession of same, but stipulating that until he does take such possession, the mortgagor is to retain the control and possession of the property, to be used by him in the usual course of business and to apply the proceeds of all sales to the satisfaction of the debts secured by the mortgage, is valid and enforecable; and where the mortgagor, in carrying on such business sells goods on credit, the mortgagee has a prior lien on such claim as against the other creditors of the mortgagor. New Albany Woolen Mills v. Lewis. 398

MOTION TO DISMISS—

When too late—See Practice in Civil Cases, 1.

MUNICIPAL CORPORATIONS—

As to when may tax farming lands for municipal purposes—See Taxation, 1, 4.

As to right to pass ordinance fixing penalty at less than the common law penalty—See Constitutional Law, 1.

As to restriction upon the incurring of indebtedness, notwithstanding it be in anticipation of a special assessment against certain property holders to pay the same—See Constitutional Law, 23.

NEW ISSUES—

When former judgment not conclusive of—See Res Adjudicaata, 1.

NON-RESIDENTS—

As to how action against, to set aside fraudulent conveyance must be commenced—See Commencement of Action, 1, 2.

NOTES—

As to what law controls, whether the law of the place where executed or the law of the place where payable—See Lex Loci Contractus, 1.

OBLIGOR AND OBLIGEE—

As between them when plea of no consideration not available—See Plea of no Consideration, 1.

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OFFICE AND OFFICERS—

As to right of town trustees to hold over when no election was held to name their successors—See Constitutional Law, 6.

As to forfeiture of office by sheriff who fails to renew bonds—See Constitutional Law, 7.

As to the manner of removing municipal officers—See Constitutional Law, 19.

As to jurisdiction of board of aldermen to remove municipal officers—See Jurisdiction, 4.

As to effect of failure of county court records to show the execution of an official bond by sheriff upon the validity of his bond for collection of taxes—See Bonds of Public Officers, 5.

As to when vacancy in elective office is to be filled—See Constitutional Law, 24, 25.

As to what constitutes an officer—See Constitutional Law, 27, 28.

1. The provision in the charter of cities of the first class (Sec. 2794, Kentucky Stats.), giving the mayor the right "by a written order, giving his reasons therefor, to remove from office any head of department, director or other officer appointed by him," does not authorize the arbitrary removal of officers appointed for definite terms and at fixed salaries, without notice and opportunity to be heard. Such a construction would give to the mayor an arbitrary power to remove without a trial and without opportunity to be heard, these important municipal officers—a thing never intended by the legislature and in direct antagonism to the whole policy of the State. Todd, Mayor, v. Dunlap, et. al. 449
2. The provision in a city charter that a municipal officer "shall receive a salary of not less than $2,500," does not fix the salary. City of Louisville v. Wilson 598

As to official duties of jailers and their fees, and their authority to furnish fuel, lights, etc., to county officers—See Jailers, 1, 2.

ORDINANCES—

As to when municipal ordinance may fix different penalty from that provided by statute—See Constitutional Law, 13.

As to fixing of penalty by ordinance at less than common law penalty—See Constitutional Law, 1.

As to proper passage of, under provisions of charter—See Computation of Time, 2.

As to validity of, with reference to street improvement—See Street Improvement, 6, 7.

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ORDINANCES—Contiued.

1. In the absence of any express provision by statute for testing the validity of municipal ordinances, the proper method of so doing is by appeal from the judgment of the police court, and the appeal must be prosecuted in the manner provided in other cases. City of Owensboro v. Sparks, ... 351
2. A board of council has no authority to create offenses by ordinance and enforce penalties for violating them, without the statutory authority to do so is plainly conferred upon it.

The provision in a city charter giving the board of council the right to pass ordinances "to prohibit and suppress all gambling houses" does not include the authority to pass an ordinance to punish gaming. *Idem* 351

As to validity of ordinance providing for street improvement —See Street Improvement, 8, 9, 10.

ORIGINAL CONSTRUCTION—

As to what constitutes, in street improvement—See Street Improvements, 2.

PARTIES TO ACTIONS—

As to who is bound by a judgment, although not a party to the suit—See Judgments, 1.

As to pleading matters between one of parties to a suit and one not a party—See Pleadings, 5.

1. Where a life estate is given to a married woman and her husband, with remainder to "the right heirs" of said husband and wife, on their death without issue, in a suit by the collateral heirs of the husband to recover the land, the collateral heirs of the wife were proper parties; but the defendant in this case having merely denied the plaintiff's allegations of ownership of the land, without asserting any claim or interest therein himself, can not for the first time in this court on appeal complain of said defect of parties. Brent v. Long, et. al. 245

PASSENGER—

As to right to re-enter train after ejection for refusal to pay fare—See Railroads, 1.

As to right of protection from insults, etc., of other passengers while on railroad train—See Railroads, 2.

As to ejection of, from train when agent, by mistake, sold him wrong ticket—See Railroads, 13.

As to measure of damages when he is refused a ticket and is charged extra fare by conductor—See Railroads, 17.

PENAL STATUTE—

As to when void for uncertainty—See Railroads, 3.

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PEREMPTORY INSTRUCTION—See Railroads, 7.

PERSONAL REPRESENTATIVE—

As to when he has right of action for death of his intestate by negligence or wrongful act—See Constitutional Law, 17, 18.

PER STIRPES—

Devise in remainder or reversion to "the rest of my children and the children of those who are dead" means the testator's children and the descendants of his dead children, *per stirpes*—Crozier, et al. v. Cundall, et al., 202.

PHYSICIAN—

As to sale of intoxicating liquors by—See Intoxicating Liquors, 1.

PLEA OF NO CONSIDERATION—

1. Where the evidence discloses that a note was executed to the payee by the two obligors, who were brother and sister, for the purpose of enabling the payee to raise money for the use of one of the obligors, and the money was so raised and used, the plea of no consideration is not available. Wm. Glenny Glass Co. v. Taylor, &c., ... 24

PLEADINGS—

As to allegations in an action for breach of warranty of title to land—See Warranty, 1.

1. The court did not abuse its discretion in refusing to permit the defendant to file the several amended answers which were tendered, because the facts stated in the amendments must have been known to the defendant at the time his original answer was filed, and should have been alleged therein, and especially where neither of the proposed amendments contained a statement of facts which, if true, would have constituted an available defense. Brady v. Peck. 42

2 In an action against the principal in a note, the surety therein not being a party, the averments by the principal in his answer that the plaintiff owed numerous debts to the surety and the surety several to the plaintiff, without alleging there had been a settlement between them and a balance ascertained, and setting up an agreement between all the parties by which plaintiff was to apply as a credit on the note the amount due by him to the surety, formed no material issue. Hale v. Grogan. 170

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PLEADINGS—Continued.

3. The plea of release was insufficient because there was no statement of facts showing any consideration for the agreement to release, or showing actual release from the obligation to pay. *Idem*. 170

4. In order to make a plea of accord and satisfaction good, it is necessary to allege not only that the parties had agreed upon the terms of settlement, but that the agreement was executed and the satisfaction made and performed in compliance with the agreement. *Idem*. 170

5. It was error for the court to permit the pleadings to be encumbered with matters of account between the plaintiff and one who was not a party to the action, because they were not relevant to the issues involved and could not properly be litigated in the action. *Idem*. 170

As to necessary allegations of answer, in action to recover land—See Ejectment, 1.

6. When a defective pleading states facts sufficiently general to comprehend a fair and reasonable intendment, and there is enough in it to show that the plaintiff had a cause of action, the defect in the pleading will be cured by a verdict. Mass. Benefit Asso. v. Richart. 302

As to necessary allegations in suit seeking damages for death by negligence or wrongful act—See Constitutional Law, 17, 18.

7. A suit where recovery is sought for the death of plaintiff's intestate, caused by the "willful, gross and reckless negligence" of the defendant, is not an action for willful neglect, the word willful being manifestly used as the synonym of "gross;" and an instruction as to compensatory damages was properly given. East Tenn. Tel. Co. v. Simms' Admr. 404

As to pleadings in action on accident insurance policy—See Accident Insurance, 3.

POLICE COURTS—

As to exclusive jurisdiction of police courts in cities of fourth class—See Jurisdiction, 2.

As to jurisdiction of in cities of third class—See Jurisdiction, 3.

PRACTICE IN CIVIL CASES—

1. After a case has been argued and submitted, it is too late for the plaintiff to enter a motion for dismissal. Glenny Glass Co. v. Taylor, &c. 24

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PRACTICE IN CIVIL CASES—Continued.

2. The question as to the sufficiency of an amended pleading may be properly raised either by objecting to the filing thereof when it is offered, or by insisting on the demurrer after it is filed. Brady v. Peck. 42

As to proper method of enforcing judgment against one who is bound by a judgment, but not a party to the action in which it is rendered—See Judgments, 2.

3. Where a defendant is arrested upon the affidavit provided for in section 152 of the Civil Code the better practice in controverting the grounds of arrest is to do so by counter-affidavit, separate and distinct from the pleadings in the case. Hale v. Grogan. 170

4. Where one brings a suit "as agent" without disclosing the nature of his agency and for whom he is acting, and the defendant neither files special demurrer nor objects to the same in his answer, all objections thereto are waived. Hill v. Rudd. .. 178

As to right to amend grounds in a contested election case—See Contested Elections, 1.

5. While section 473 of the Kentucky Statutes provides that "the execution of a writing on which a suit or defense is founded, or its assignment, shall only be denied by answer or other pleadings verified by oath," yet the Civil Code, section 138, provides when the objection for want of verification must be made, and if it is not made at that time, it is waived. Myers, Admr. v. Douglas. 267

6. The provision in the charter of towns of the fifth class (section 3629, Kentucky Statutes) which says in speaking of the city marshal that "he shall, and is hereby authorized to execute and return all process issued, and directed to him by any legal authority," only means process issued and directed by municipal authority; and does not authorize him to serve process from the circuit court, or the clerk of that court to direct the same to him. Pinckard, Receiver v. Davis 269

7. Where a plaintiff, without notice, enters a motion to appoint a receiver to take charge of the property in suit, and files an amended petition, and the defendant answers the amended petition, and resists the motion to appoint a receiver, any irregularity in filing the amended pleading or entering the motion was waived by the defendant. Miller v. Cavanaugh. 377

8. The overruling of a demurrer is not prejudicial to the substantial

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PRACTICE IN CIVIL CASES—Continued.

rights of the defendants where the same questions raised by the demurrer were raised in the answers of the defendants; and as each defendant filed such answer to the petition, it must be regarded as a waiver or virtual withdrawal of the demurrer. Fehler v. Gosnell. 380

9. Where in a general verdict the jury merely finds for the plaintiff, without fixing any amount, and the recovery if anything must be money, the court is not authorized to fix the amount of the verdict and render judgment therefor. (Civil Code, Sec. 329.) L. & N. R. R. Co. v. Hartwell. 436

As to when damages must be assessed upon dissolution of injunction—See Injunction Bond, 1.

10. Where the allegations of an amended pleading offered at the close of the evidence on the trial, does not disclose anything which the party offering it may not have known before by the exercise of reasonable diligence, and does not conform to the proof, the court properly refused to permit it to be filed. Louisville Ins. Co. v. Monarch, et al. 578

PRACTICE IN COURT OF APPEALS—

As to reversal of criminal case—See Criminal Law, 1.

1. The jury having passed upon the liability of the company on the policy, and it having had its opportunity to contradict the evidence as to the property recovered and its value, and there being no conflict in the evidence on that point, and that being the only point upon which the judgment is reversed, this court will not order a new trial, but will direct the proper judgment to be entered. Louisville Ins. Co. v. Monarch, et al. 578

PRACTICE IN CRIMINAL CASES—

See Criminal Law.

PREPONDERANCE—

As to instructions upon preponderance of evidence—See Evidence, 1, 2.

PRESIDENTIAL ELECTORS—

They are "State officers" within the meaning of section 152 of the Kentucky Constitution—Todd, Mayor v. Johnson, County Clerk, et al., 548.

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PRIORITY OF LIENS—

As to priority of lien for damages over purchase money lien—See Vendor and Vendee, 2.

As to priority of mortgage lien on stock of goods and credits, over an attachment—See Mortgages, 1.

PROTECTION TO FISH—

Acts providing for are not special legislation—See Constitutional Law, 9.

PROXIMATE CAUSE—

See Railroads, 8.

PUBLIC USE—

The closing of an alley by a city for the purpose of allowing the land therein to revert to the abutting property owners for a money consideration, is not a public use for which private property can be taken from one citizen and given to another—City of Louisville v. Bannon, 74.

PUBLIC WAYS—

1. It being manifest that the object of this proceeding upon the part of the city was to close the alley and allow the land therein to revert to the abutting property owner for a money consideration, the court below properly refused to close it, as a mere money consideration to be paid to the State or municipal government is not a public use for which private property can be taken from one citizen and given to another. City of Louisville v. Bannon. 74
2. The grant of the power to vacate and close public ways can not be drawn by implication from section 2826 of the Kentucky Statutes which provides that no public way shall be opened, narrowed, closed or constructed except by ordinance recommended by the Board of Public Works, as that provision is purely prohibitory in its nature. Nor can such a power be safely held to be included in the grant in section 1 of the act for the government of cities of the first class of "power to govern themselves by such ordinances and resolutions for municipal purposes, as they may deem proper, not to conflict with this act, nor the constitution and laws of this State." *Idem.* 74
3. Where an alley is constructed through one-quarter of a square and into but not through another quarter, the whole cost of the construction of the alley should not be equally apportioned to and assessed upon the ground embraced in the two quarters

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PUBLIC WAYS—Continued.

of the square, without reference to the length or extension of the alley in each of them; but the ground in each quarter is liable to assessment only for its ratable proportion of the cost of the construction of that part of the alley binding upon the quarter of the square in which it is situated. Dumesnil, et al. v. Gleason. 652

RAILROADS—

As to sale of road-bed to satisfy vendor's lien on land—See Vendor and Vendee, 4.

As to indictment for failure to furnish separate coaches—See Criminal Law, 8.

1. Where a passenger has been rightfully ejected or in part expelled from a train for non-payment of fare, he is not then entitled to tender the fare and demand transportation. But where there is a dispute as to the station or point where the passenger is to change cars for his point of destination, the train not having been stopped solely for the purpose of ejecting him, he may, after having yielded quietly and submissively to ejection, tender his fare and have the right to re-enter the train just as other passengers. L. &. N. R. R. Co. v. Breckinridge..... 1

2. Carriers are not the insurers of the absolute safety of their passengers or of their entire immunity from the misconduct of fellow-passengers or of strangers, but there is an implied obligation growing out of the contract between the carrier and the passenger, that the former shall afford to the latter reasonable protection and immunity from the insults, violence and wanton interference of intruders, fellow passengers and employes. And out of this obligation arises the rule that makes it the duty of carriers to exercise the highest practical degree of care and diligence in protecting and guarding passengers from violence and assaults from whatever source, which may be reasonably anticipated or naturally expected to occur under the circumstances of the case and the condition of the parties. Kinney v L. & N. R. R. Co. 59

3. Section 816 of the Kentucky Statutes, which provides that "if any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or the use of any railroad car upon its tracks or upon any track it has control of, or has the right to use in this State, it shall be guilty of extortion," and the subsequent sections fixing a penalty therefor, are void for uncertainty, because they fail to pre-

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RAILROADS—Continued.

scribe or fix what is a "just and reasonable rate" by which the railroad could be governed in its conduct. L. & N. R. R. v. Com. 132

4. The fact that one railroad company operates and controls, as lessee, all trains which run over two lines of railroad at the point where they cross each other, does not relieve it from liability under a statute which requires all railroad trains to be brought to a full stop at least fifty feet before getting to where they cross the tracks of another railroad, and fixing a penalty for failure to do so. C. & O. R. R. Co. v. Com. 175

5. It is the duty of a common carrier to acquire facilities for the transportation of commodities which it gives the public to understand it is engaged in carrying, in such quantities as may be ordinarily expected to seek transportation; but it is not required to anticipate an unprecedented and unexpected press of business, and to keep extra rolling stock to meet such a contingency; and under such circumstances it may decline to receive freight for transportation without incurring any liability. L. & N. R. R. Co. v. Queen City Coal Co..... 217

6. Where a railroad company received its coal supplies necessary to operate its engines from a coal district on its line, and there was a strike of the employes of all the coal companies in that district, except one, and the railroad company was compelled to take all its available rolling stock to another coal district in order to haul coal to supply its engines, it had a right to refuse to furnish cars for the transportation of coal to the one company in operation in the first district. *Idem*..... 217

7. Upon the trial of an action for damages against a railroad company for injury to a child, it appearing from the plaintiff's evidence that on the day the injury was received, the eleven-year-old boy boarded the freight train without the knowledge or consent of the conductor for the purpose of riding a short distance to a water-tank, and reached there in safety and got off the train; but after the train had started again, without the knowledge of the conductor and not within his sight, he caught hold of a ladder handle for a short time, and afterwards in jumping from the train landed on a pile of coal alongside of the track, part of which slipped under his feet and threw him under the train whereby he lost one of his feet, a peremptory instruction to find for the defendant should have been given. L. & N. R. R. Co. v. Webb 332

8. The immediate or proximate cause of the accident under these circumstances was the dislocation of the lumps of coal when his

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RAILROADS—Continued.

feet struck the pile, whereby his foot was thrown under the cars. *Idem* 332

9. Testimony as to what the conductor said to the boys on days previous to the day the accident occurred, and the testimony that the conductor and brakemen had on previous days encouraged the boys to catch hold of the ladders and swing therefrom, was inadmissible. *Idem* 332

10. A statement of the conductor after the train had run some distance and stopped, and he had returned to the place of the accident, was not competent as part of the *res gestae*. *Idem*. 332

11. A child is required to exercise only such a degree of discretion and care as may be reasonably expected of one of his age and intelligence under like circumstances; but age alone is not the test of the degree of care required of children in such cases. *Idem* 332

12. The placing of coal by a railroad company along its tracks, for its own necessary use, is not negligence, and not likely to be the cause of any such accident as happened in this case. *Idem* 332

13. When, through the mistake of a ticket agent, one is sold a limited ticket, for which he had not applied, and, after missing the train on the day of purchase, took the next train, which was the following day, and was forcibly ejected therefrom by the conductor because the ticket was out of date the previous day, the passenger may maintain his action in tort for damages. L. & N. R. R. Co. v. Gaines 411

14. When, after goods have been received by a carrier for transportation, and before their delivery to the consignee, the shipper gives it notice that they are not to be delivered to the consignee unless the bill of lading is presented by him and a draft for the price of the goods paid, and the goods are delivered to the consignee in violation of this order, the carrier is liable for the value of the goods; and after such notice, the presumption no longer obtains that the consignee is the owner of the goods. L. & N. R. R. Co. v. Hartwell 436

15. In an action for damages against a railroad company, charging negligence as the cause of a collision at a crossing, and in which contributory negligence was pleaded as a defense, it appearing that by reason of the conformation of the surrounding country travelers upon the highway approaching the crossing could not see a train coming until within twelve or fifteen feet of the crossing, but that the engineer and fireman on the train could have seen the danger in time to have stopped the train or so

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RAILROADS—Continued.

checked its speed as to have avoided the collision, and there being evidence that the whistle was not blown in time to have warned persons on the highway approaching the crossing, a motion for a peremptory instruction was properly overruled. N. N. & M. V. Co. v. Stuart's Admr. 496

16. When a crossing is near a populous town, and must be crossed by a large number of people going to and from the town, both on horseback and in vehicles, and the conformation of the surrounding country is such that one can not see trains approaching from one direction until within fifteen or twenty feet of the track, and when under certain conditions, which are not infrequent, the approach of the train or its whistle can not be heard, the railroad company should be required to have a flagman at that point to warn travelers of approaching trains, or to adopt and use some other reasonably safe mode of warning them. *Idem* 496

17. Where one applies to a railroad ticket agent for a ticket to a certain station, and the agent believing that the train about to go did not stop at that station, refused to sell it to him and he boards the train, and the conductor in accordance with the rules of the company, charges him extra fare because he has no ticket, there being nothing in the pleadings or evidence to show that either the agent or conductor acted in other than good faith and according to orders, or that the latter was insulting or abusive, the measure of damages was the difference between the regular fare and what the conductor collected; and an instruction as to punitive damages was properly refused. Courts v. L. &. N. R. R. Co. 574

18. The conductor of a freight train and one employed by a railroad company to inspect each car of a train and ascertain if it is in safe condition, are not fellow-servants in the sense of being upon a common footing and agents of each other. They acted in different spheres and neither could or was required to know whether the other did his duty. Ill. Cen. R. R. Co. v. Hilliard 684

19. A jury should not be required to believe that a car inspector had been guilty of gross negligence in his examination of cars, before one injured by reason of defective appliances thereon can recover. The simple inquiry should be, did the company, through its inspector, use ordinary care in examining the car so as to ascertain whether the appliances were in a safe condition? *Idem* 684

20. While it is the duty of a conductor to examine the condition of

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RAILROADS—Continued.

a train before taking charge of it, he could not reasonably be required or expected to make such a close and minute examination as to discover a latent defect. There is a difference in the degree and character of examination required of a car inspector, who is employed for that special purpose, and that required of a conductor. *Idem.* 684

RAILROAD CROSSING—

As to failure of trains to stop at—See Railroads, 4.

As to when company should be required to have flagman at—See Railroads, 16.

RECEIVER—

As to waiver of notice of motion to appoint—See Practice in Civil Cases, 7.

REMAINDERMAN—

As to when not chargeable with improvements put on property by life-tenant—See Life-tenant, 1.

RENTS—

1. Where one leases land for a term and dies before the expiration of the term leaving a will disposing of the leased property, the rents accrued thereon prior to his death should go to his estate, and those accruing afterwards to the devisee; and the fact that no part of the rent was due under the terms of the lease at the time of his death, does not change the rule. Anderson v. Richard's Ex'ors. 661

RENUNCIATION OF WILL—

Effect of, by widow—See Wills, 12.

RES ADJUDICATA—

1. A judgment of a court of competent jurisdiction is generally conclusive not only as to all matters determined by it, but of all incidental matters which might have been properly litigated and decided in the same suit; but this rule should not be applied where the new issues, being as to material and distinct matters, were not presented and determined in the former action either through the fraud of one party, or the unavoidable casualty and misfortune of the other. Bement v. O. V. Banking & Trust Co. 109

2. This court, on a second appeal in the same case, will treat the opinion of the Superior Court on the former appeal as the law of the case whether that opinion be erroneous or not; but it would not be proper for the court to follow such an opinion unless the law as therein held applies to the facts in the record on a second appeal. L. & N. R. R. Co. v. Offutt. 427

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RESCISSION—

1. When a contract for the sale of land is rescinded the vendee has a lien upon any part of the land owned by the vendor, for any sum which he may have paid upon the purchase price, whether the vendee was in possession thereof or not. Bullitt, et al. v. Eastern Ky. Land Co. 324
2. An action purely for a rescission of a contract for the sale of land is transitory, being an action *in personam*; but when in such an action it is further sought to enforce a lien on land which results from the rescission, then the action becomes local and the jurisdiction is in the county where the land lies, whether the defendants are served with process there or not. *Idem.* 324

RES GESTAE—

See Railroads, 10.

RESIDUARY CLAUSE—

As to construction of—See Wills, 9.

RIGHT HEIRS—

As to meaning of expression in deed—See Deeds, 1.

ROADS—

As to right and duty of Fiscal Court to improve—See Fiscal Court, 1, 2.

ROLLING STOCK—

As to duty of railroad company to furnish to shippers—See Railroads, 5. 6.

SALES OF PERSONAL PROPERTY—

See Vendor and Vendee, 5, 6.

SALES OF INFANTS' REAL ESTATE—

1. In an action under the provisions of section 490 of the Civil Code, for the sale of infant's real estate, owned jointly with others, it must not only appear that the property was indivisible, but that the infant had vested estate and was in possession—Swearingen v. Abbott, et al. 271

SCHOOLS—

As to when an election to vote an annual tax for school purposes to be ordered—See Elections, 1.

As to taxation of school property—See Taxation, 2, 3.

SEPARATE COACHES—

As to indictment for failure to furnish, and failure of conductor to assign parties to proper coach—See Criminal Law, 8.

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SHERIFFS—

As to power of county court to declare office of vacant for failure to renew bonds—See Constitutional Law, 7.

As to power of county court to accept renewal bonds subsequent to the time they are required to be executed—See Bonds of Public Officers, 1.

As to liability of sureties on official and revenue bonds of—See Bonds of Public Officers, 2, 5.

Failure of county court records to show execution of official bond does not affect validity of bond for collection of taxes—See Bonds of Public Officers, 5.

SPECIAL JUDGE—

1. Where a special judge is selected by agreement, or elected to preside in a case, the presumption is that such orders as are entered in the case were made by him, unless the contrary is shown by the record. Bullitt, et al. v. Eastern Ky. Land Co. 324

SPECIAL LEGISLATION—

Acts providing for protection to fish are not—See Constitutional Law, 9.

STATUTORY CONSTRUCTION—

1. Statute requiring issual of a writ of proclamation by Circuit Judge for an election to fill vacancy in office of circuit clerk is only directory, and not mandatory. As the Constitution fixes the time for holding such an election, it will be presumed the voters knew of the vacancy and that an election was to be held.

But where the time and place for holding the election must be designated by the one authorized to call it, the rule would be otherwise. Sterritt v. McAdams. 37

As to effect of a change in a general law—See Criminal Law 5.

As to grant of power to vacate and close public ways—See Public Ways, 2.

As to construction of local option law—See Local Option, 1, 2, 3.

As to construction of statute authorizing removal of municipal officers—See Office and Officers, 1.

As to construction of statutes authorizing a guardian with leave of court to compound a debt or demand of his ward—See Guardian and Ward, 2.

As to construction of statute declaring the right of the issue of illegal and void marriages to inherit—See Descent and Distribution, 1, 2.

2. The provision in a city charter that a municipal officer "shall receive a salary of not less than $2,500.00" does not fix the salary. City of Louisville v. Wilson. 598

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STREET IMPROVEMENTS—

As to taxation of school property to pay—See Taxation, 2, 3.

1. A city having the authority to contract for street improvement, but no authority to make it a charge upon the abutting property, is liable to the contractor for the cost of the work. City of Louisville v. Leatherman, et al. 213
2. Where a portion of an old turnpike road became a public way of a city by reason of the extension of its limits, so as to include the same, the re-grading and paving thereof was "original construction" within the meaning of the statute, which provides that when the improvement is the original construction of a street, it shall be made at the exclusive cost of the owner of the lots; but when the improvement is the reconstruction thereof, the city shall pay the costs. McHenry v. Selvage, et al. . 232
3. A statute which provides that copies of the ordinance authorizing the improvement, a copy of the contract therefor, and of the apportionment, each attested by the clerk of the board of council, shall be proof of the passage, approval and publication of the ordinance, and *prima facie* evidence of every other fact necessary to be established by the plaintiff in actions to enforce liens for street improvements is valid. (Zable v. Orphan's Home, 92 Ky., 91.) *Idem*. 232
4. A suit on apportionment warrants for street improvements seeking a sale of the property, is a proceeding *in rem*, against the property and a judgment therein may be appealed from, although it be for less than $100.00. Fehler v. Gosnell 380
5. After a contract has been let and the work performed, it is too late to rely upon the objections that the notice does not inform the public of the general nature of the work, and that it does not state the nature and extent of the bond or security required. *Idem*. 380
6. Under the authority conferred in the charter for cities of the first class to levy assessments against individual property-holders to pay the cost of street improvement, the city can not, by ordinance, require of the contractor a deposit in bonds equal to ten per cent. of the contract price, as a guaranty that he will keep the same in repair for five years, because such a provision necessarily increases the burden of the property-holders by adding the cost of repairs, for which the city alone under the provisions of the charter is liable. *Idem*. 380
7. Such ordinance, however, is not absolutely void, and the contractor is still entitled to recover except to the extent the property owner's assessment has been increased on account of the requirement of such bond and security from the contractor. *Idem*. 380

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STREET IMPROVEMENTS—Continued.

8. An ordinance passed by the common council of a city of the third class, requiring owners of certain property to construct sidewalks, curbing and gutter-ways in front thereof, within thirty days, thereby giving the owners an opportunity to do the work themselves before letting it out by contract to others is not violative of the provisions of the charter (Sections 3449 and 3450 Kentucky Statutes), that the council may pass ordinances to require the improvement of streets at the cost of the abutting owner, and that upon the passage of such ordinance it shall be the duty of the mayor to enter into a contract with any person offering to do the work on the best terms, etc. Board of Councilman of Frankfort, et al. v. Murray. 422

9. An ordinance locating the streets to be improved, and sufficiently designating the lots and parts of lots, and providing that the sidewalks were to be of "brick and curbed with stone and provided with stone gutter-ways; the sidewalks to be eight feet wide from the line of the respective lots to the inside line of the curbing, and to be at the grade or elevation heretofore fixed by the city engineer and adopted by this board, and as shown and established by stakes already set in front of said respective lots or parts of lots," is a sufficient compliance with the provision in the charter requiring that such an ordinace shall "fully declare and prescribe the kind and extent of improvements to be made." *Idem.* 422

10. The ordinance is not invalid because the kind of stone and its thickness and width are not prescribed; some of the details of this kind of work may properly be left to the city engineer, without a violation of the law, forbidding the delegation of legislative power. *Idem.* 422

STRIKES—

As to duty of railroad company to furnish cars to shippers during—See Railroads, 5, 6.

SUB-LETTING—

Refusal by lessor to agree to, no defense to action for rent and no reason for cancellation of lease—See Lease, 2, 3.

SUBSCRIPTION OF STOCK—

As to, in corporations—See Corporations, 1, 2.

SURETIES—

As to liability of, on official and revenue bonds of sheriff—See Bonds of Public Officers, 2. 5.

As to limitation applicable to, on county clerk's bond—See Bonds of Public Officers, 4.

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TAXATION—

1. Ordinarily farming lands which are added to a town by extension of its boundaries, for the purpose of increasing the taxable property and adding to the coffers of the town treasury, can not be made subject to such local taxation. But where the owner of such property was active in having the town laid off and incorporated so as to include his said farming lands, and his property was enchanced in value thereby, it is subject to municipal taxation. Benedictine Order of Covington v. Town of Central Covington. 7
2. The property of a school board held by it for the use of the State, to carry on the system of common schools established under the constitution, is not subject to execution or levy, or to decretal sale to satisfy a lien for street improvement. City of Louisville v. Leatherman, et al. 213
3. The appropriation of any part of a school fund or of the taxes which have been devoted to the purposes of the common school system, to the payment either of general taxation for the support of the State government or of special assessments to pay the cost of street improvements, would be an appropriation thereof to another purpose than that of the school system, which is forbidden by section 184 of the constitution. *Idem*. 213
4. Where farming lands have been brought into the city by an extension of its limits, the extension being made for the legitimate purposes of improving the town, and not for the unauthorized purpose only of lessening the burden of taxation on its inhabitants, considering the character and location of the property, its proximity to two railroads depots and shops, and to the business portion of the town, and the actual and prospective growth of the town, and the extension of the police jurisdiction of the town over the locality, and the benefits and advantages necessarily afforded and enjoyed by the owners by reason of the very existence and presence of the municipal government, the property should be required to bear its proportion of the burden of municipal taxation, although the lands were never divided into lots or used as city property. Briggs, Trustee v. Town of Russellville. 515
5. The fact that a corporation created under the laws of the State of Kentucky for the purpose of constructing a bridge across the Ohio river, has obtained from the State of Indiana and from the Congress of the United States certain powers and privileges with reference to the construction of the bridge, is no reason why it should not pay a franchise tax in this State. And even if the Kentucky charter had been supplemented by a similar

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TAXATION—Continued.

charter from the State of Indiana, authorizing the construction of that portion of the bridge erected in that State, it would be no reason why it should not pay taxes on both its tangible property in this State, and its franchise granted in this State. Henderson Bridge Co. v. Com. 623

6. A bridge company chartered by the State of Kentucky, and authorized to build a bridge across a stream which is the boundary line between this and another State, and to transport merchandise and passengers over its structure, in consideration of reasonable rates of toll, is not engaged in commerce; and the taxing of the franchise of such a corporation by the State of Kentucky is not an attempt to regulate commerce between the States, but merely the exercise of its right to tax the franchise of a corporation created by it. *Idem.* 623

7. The "capital stock" of a corporation within the meaning of section 4079 of Kentucky Statutes prescribing the manner in which the value of corporate franchises shall be ascertained, includes the entire property, real and personal, tangible and intangible, and assets on hand, as well as the franchise of the corporation. *Idem.* 623

8. A corporation, in assessing its property for taxation, can not obtain any credit for any debt it may owe. The constitution requires that the property of all corporations must be taxed in the same manner as the property of individuals, and they are allowed no such credits. *Idem.* 623

TERMS OF COURT—

As to terms of county court—See County Courts, 1, 2.

As to when county court may treat entire time it is in session as but one day—See County Courts, 3.

TERMS OF EMPLOYMENT—

As to, between master and servant—See Master and Servant, 1, 2.

TITLE OF ACT—

As to, what not necessary in—See Constitutional Law, 2.

TOWNS—

As to establishment of, by court—See Constitutional Law, 16.

As to effect of act of Legislature designating a place as belonging to a particular class of towns, when it had never been incorporated—See Classification of Cities, 1.

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TOWN TRUSTEES—

As to their right to hold over when no election held to name their successors—See Constitutional Law, 6.

TRUSTS—

As to definiteness of trustees and beneficaries in charitable trust—See Wills, 11.

UMPIRE—

As to right of arbitrators to select—See Arbitration and Award, 1.

VACANCY—

As to in office of circuit clerk—See Elections, 2, 3.

As to in office of sheriff by failure to renew bonds. See Constitutional Law, 7.

As to how and when vacancy in elective office to be filled—See Constitutional Law, 24, 25.

VENDOR AND VENDEE—

As to effect of arrangement between defendant in a suit for breach of covenant of warranty and his vendor—See Warranty, 2.

1. Where it is provided in a deed by two vendors to a vendee that the vendee is not to dispose of his interest in the property conveyed without the consent in writing of the two vendors, the vendee can, nevertheless, convey and pass title to his interest therein to one of the vendors without the written consent of the other. Miller v. Denny, &c. 53
2. Where the deed shows that the vendee was to render certain service and perform certain work as consideration for the land, and the vendor has been damaged by his failure to do so, he can recover such damage and is entitled to a lien on the vendee's interest in the land for the payment of the same, and the lien is superior to the purchase-money lien, under the sale by the vendee to one of the vendors, although the notes for the same have been assigned to others. *Idem.* 53
3. Where the vendee of land gives his consent for the construction of a railroad over the land, and subsequent to the building of the railroad the vendor brings a suit to foreclose his purchase-money lien on the property to which the company was a defendant, and the court orders the sale of all the tract, except that which constitutes the roadbed, with a proviso that if that failed to bring the amount of the debt the balance would be made out of the road bed, it was proper for the court to then

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VENDOR AND VENDEE—Continued.

permit the company to file its cross-petition so as to enable the court to determine the mode in which the roadway should be disposed of or the company made to account for its value. Finnell's Ad'mr v. Louisville Southern R. R. Co. 570

4. In such a case, where the land outside of the right of way was insufficient to pay the lien debt, the right of way with the improvements thereon should not be sold to satisfy the lien for the balance of the debt; but the right of way should be condemned and the value thereof, together with the damages to the rest of the tract, should be adjudged against the railroad company, with a lien upon the roadbed to secure it. *Idem*.. 570

5. The general doctrine is that when the vendee of goods uses them, he thereby accepts them, and can not recover for defects discovered before they were used; but where he had paid the purchase-price in advance upon the faith of the vendor's warranty, and before the defects were discovered or opportunity for their discovery offered in the ordinary course of business, and had given prompt notice to the vendor of the defects when discovered, which defects were substantially admitted, in a suit against him by the vendor for the price of a bill of goods subsequently received, he may be allowed to set up in his answer and counter-claim damages by reason of the defects in the first goods shipped. Nat. Oak Leather Co. v. Armour-Cudahy Co. 667

6. Ordinarily the vendee can not prescribe the conditions on which he will return or surrender the goods, the quality of which he asserts does not satisfy the contract, but in this case where the original claim for damages remained unpaid, and necessary expenses having been incurred in preserving the goods, it had a right to retain part of the goods as indemnity for loss.

The vendor being a non-resident of this State without property therein, the vendee was not required to let the whole or any part of its indemnity get out of its control or go to ruin. *Idem*. 667

VESTED INTEREST—

As to necessity of, in infant, before sale under section 490 of Civil Code—See Sales of Infants' Real Estate, 1.

VERDICT—

As to power of court to render judgment on a general verdict which fixes no amount of recovery—See Practice in Civil Cases, 9.

As to when a verdict in a criminal case sufficiently fixes degree of guilt—See Criminal Law, 7.

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VERIFICATION—

As to waiver of—See Practice in Civil Cases, 5.

WAIVER—

As to, where no demurrer filed or objection made to filing suit by one "as agent" without disclosing the nature of his agency—See Practice in Civil Cases, 4.

As to waiver of verification—See Practice in Civil Cases, 5.

As to waiver of right to notice of motion to appoint receiver. See Practice in Civil Cases, 7.

As to waiver by defendant of right to make objections in Court of Appeals because of failure to demur or move to set aside an indictment improperly presented in the lower court—See Criminal Law, 2.

WARNING ORDER—

As to necessity for, in action against non-resident defendant to set aside fraudulent conveyance—See Commencement of Action 1, 2.

WARRANTY—

1. In an action for breach of covenant of warranty of title to land, where the deed containing the covenant is filed with the petition it is sufficient to allege in the petition the substance of the covenant, without setting it out in the express terms used in the deed. And an allegation in such a petition that the defendant in the deed "warranted the title against all persons whatsoever" is sufficient, although the only covenant in the deed was that the title was conveyed "with covenant of general warranty." Brady v. Peck. 42
2. An arrangement between the defendant in a suit for breach of covenant of warranty, and his vendor, can not affect the rights of the plaintiff, and can not constitute a valid defense in such an action. *Idem.* 42
3. A warranty by a grantor of title and possession to the property conveyed, is an "existing liability;" and it is not necessary to await eviction before it becomes such. Bement v. O. V. Banking & Trust Co. 109
4. Where two vendors in a contract of sale warranted generally, one as to forty per cent. of the land and the other as to sixty per cent.—upon rescission and judgment against them for what had been paid on the land, the judgment should not have been against them jointly for the full amount, but only against each of them in the proportion named. Bullitt, et al. v. Eastern Ky. Land Co. 324

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WILLFUL NEGLIGENCE—

As to when allegation of, is synonymous with gross negligence—See Pleadings, 7.

WILLS—

1. A devise by a testator to two of his daughters of land to them and their heirs forever" in one clause of his will, but providing in a subsequent clause thereof that if either of them "should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between the rest of my children and the children of those who are dead," is a defeasible fee, and can be defeated alone by death without bodily issue. Crozier, et al. v. Cundall, et al.. 202
2. It is a recognized principle that in the construction of wills there can be no iron-clad rule applicable alike to all cases, but the application of all rules of construction must necessarily be varied by the language used by the testotor, the object being to arrive at his intention, to be gathered from the entire will. *Idem.* 202
3. Where a testator made a joint devise to two of his daughters, but providing that if either of them "should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between the rest of my children," although there was no right of survivorship as between the joint devisees, yet the death of one did not divest the other of her own interest; and the survivor takes under the will her share of the deceased sister's interest just as the other children of the testator do. *Idem.* 202
4. The expression "the rest of my children and the children of those who are dead," means the testator's children and the descendants of his dead children *per stirpes*. *Idem.* 202
5. The cardinal rule, which is of universal application, in the construction of wills, is that the intention of the testator as gathered from the instrument as a whole, must prevail, if not opposed to some positive provision of the law or some general principle of public policy. Bedford, et al. v. Bedford's Ad'mr, et al... 273
6. A devise by a testator of land to his daughter with the following limitations: 'The property bequeathed to my daughter, Elizabeth, to go to her child or children at her death, or if she and her son Robert die without children, the estate to revert to her four brothers now living, their heirs and assigns forever," must be construed as intending that the land so devised should revert to her brothers only if both the daughter and her son should

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WILLS—Continued.

die without issue previous to the death of the testator; and the daughter having survived the testator, on her death her son was invested with absolute title. *Idem.* 273

7. Where a testator provides in one clause of his will "and after my death my will and desire is that the same be equally divided between my five children, their heirs and assigns forever," and in subsequent clause says, "It is my will and desire that in case of the death of my daughter, Elizabeth (she being one of the five children), before her son shall have arrived at the years of maturity, and should her son die without issue, that the property bequeathed shall revert and be merged in the estate;" both of the contingencies named in the last clause must happen before the property reverts to the estate; and the daughter having survived until her son attained his majority, became invested with absolute title to the land so devised. *Idem.*. 273
8. Where the terms of a will clearly give an estate, the words of a codicil must manifest an equally clear intent to revoke or change it, before they will be construed to have such an effect. *Idem.* 273
9. The restrictions in a residuary clause of a will do not operate upon the property embraced in the specific devises to the testator's children, but only upon the property passing to them under the residuary clause. *Idem.* 273
10. A provision by a testator in a codicil to his will that his wife should have for life all his land not specifically devised to his children, and that at her death all the property left to her for her life should be divided into five equal parts, "four parts to go to my four sons and their heirs forever, and the other one-fifth I bequeath to my daughter," invests the daughter with the absolute title to her part thereof, just as it does the others. *Idem.* 273
11. A devise by a testatrix of lands to her son for life, and providing that if he died without children "I desire all my lands to be sold, and the money arising from said sales I give and bequeath to the State of Kentucky, in trust forever, for the use and benefit of the children of the State. I desire that the money constitute a permanent school fund, and the interest from this fund be appropriated annually towards the education of the children of this State," created a charitable trust, definite as to the trustees and the objects of the charity, and not invalid because of the indefinite number of the beneficiaries. *Idem.* 273
12. Where a testator in his will gives the whole net income from his

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WILLS—Continued.

estate to his wife during her life, and provides for the distribution thereof at her death, upon her renunciation of the provisions of the will, the general rule is that the legacies which were to have been effective at her death, become immediately due, unless a contrary intention of the testator is manifest. Trustees Church Home v. Morris. 317

WITNESS—

As to right of one convicted of crime to testify—See Criminal Law, 5.

WRIT OF PROHIBITION—

1. Under the provisions of section 25 of the Criminal Code authorizing the circuit court by writ of prohibition to "restrain all other courts of inferior jurisdiction in the limits of the county from exceeding their criminal jurisdiction," the circuit court is not authorized to issue a writ prohibiting the police court of a city from proceeding in a prosecution for the violation of an invalid ordinance, the police court having jurisdiction of the offense described in the ordinance and the penalty therefor. City of Owensboro v. Sparks. 351

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